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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

CRANFORD INSURANCE COMPANY,
now known as AMERICAN SPECIAL
RISK INSURANCE COMPANY, a Delaware
Corporation; SPHERE INSURANCE
COMPANY, LTD., now known as
SPHERE DRAKE INSURANCE, PLC,
a British Corporation;
INTERNATIONAL INSURANCE COMPANY,
an Illinois Corporation,
Petitioners,

v.

ROHM & HAAS COMPANY; SOUTH MACOMB
DISPOSAL AUTHORITY; WASTE MANAGEMENT, INC.;
CHEMICAL WASTE MANAGEMENT, INC.;
GENERATORS OF WASTE AT THE
ENVIRONMENTAL CONSERVATION AND
CHEMICAL CORPORATION SITE, in
Zionsville, Indiana,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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October 13, 1990

QUESTIONS PRESENTED

1. Whether certiorari should be granted to resolve a direct conflict among the circuit courts of appeal regarding the standard by which protective orders in dismissed cases may be modified to give a non-party access to pretrial discovery materials?

2. Must an applicant seeking to permissively intervene in a settled and dismissed action pursuant to Fed.R.Civ.P. 24(b) show independent grounds of federal jurisdiction?

3. Does Rule 24, Fed.R.Civ.P., require that a non-party seeking permissive intervention into a settled and dismissed lawsuit file a pleading and advance an interest sufficient to support a claim or defense common to the main action?

LIST OF PARTIES

Parties

The Petitioners in this Court, who were Defendants/Appellants in the proceedings below, are Cranford Insurance Company, now known as American Special Risk Insurance Company, a Delaware Corporation; Sphere Insurance Company, Ltd., now known as Sphere Drake Insurance, PLC, a British Corporation; and International Insurance Company, an Illinois Corporation.

The Respondents in this Court, who were Intervenor/Appellees in the proceedings below, are Rohm & Haas Company, South Macomb Disposal Authority, Waste Management, Inc., Chemical Waste Management, Inc., and Generators of Waste at the Environmental Conservation and Chemical Corporation Site, in Zionsville, Indiana.

United Nuclear Corporation was also a Plaintiff in the proceedings below, and Northbrook Excess and Surplus Insurance Company, formerly known as Northbrook Insurance Company, an Illinois Corporation, was also a Defendant in the proceedings below.

Parents and Subsidiaries

Atlanta Group, Inc. is the parent company of Cranford Insurance Company, now known as American Special Risk Insurance Company.

Sphere Drake Acquisitions, United Kingdom Ltd., is the parent company of Sphere Insurance Company, now known as Sphere Drake Insurance, PLC.

Crum and Foster, Inc., is the parent company of International Insurance Company, which in turn has three subsidiaries, Crum and Foster Insurance Company, Premier Insurance Company and Seaboard Underwriters, Inc.

Xerox Corporation is the parent company of Xerox Financial Services, Inc., which is the parent company of Crum and Foster, Inc.

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ROHM & HAAS COMPANY; SOUTH MACOMB
DISPOSAL AUTHORITY; WASTE MANAGEMENT, INC.;
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Respondents.

**PETITION FOR A WRIT OF CERTIORARI
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FOR THE TENTH CIRCUIT**

Petitioners respectfully pray that a Writ of Certiorari issue
to review the judgment and opinion of the United States

Court of Appeals for the Tenth Circuit entered in this matter on June 15, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 905 F.2d 1424 (10th Cir. 1990) and is reprinted in the Appendix at 1a-8a. The memorandum opinion of the United States District Court for the District of New Mexico (Mecham, Edwin, D.J.) has not been reported. It is reprinted in the Appendix at 9a-13a.

JURISDICTION

United Nuclear Corporation filed suit against Petitioners in New Mexico state court. Invoking federal jurisdiction under 28 U.S.C. §§ 1332(a)(1) and 1441, Petitioners removed the case to the United States District Court for the District of New Mexico. The parties entered into a settlement agreement and the District Court dismissed the case with prejudice on August 28, 1986. 19a-21a.

On May 2, 1989, Respondents filed a motion to intervene and modify protective order, not citing any basis of federal jurisdiction.

The District Court granted the motion in part and denied it in part. 9a-13a.

On Petitioners' appeal, the Tenth Circuit affirmed the decision of the District Court in its opinion of June 15, 1990. 1a-8a. No petition for rehearing was sought.

On September 10, 1990, Justice White ordered that the time for filing this Petition for Writ of Certiorari be extended to and including October 13, 1990. 48a.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Civil Procedure 24(b):

(b) Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

2. Federal Rule of Civil Procedure 24(c):

(c) A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

3. Federal Rule of Civil Procedure 26(c):

(c) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district

where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37 (a) (4) apply to the award of expenses incurred in relation to the motion.

4. 28 U.S.C. § 1332 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business,

except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business[.]

STATEMENT OF THE CASE

A. Proceedings In The District Court

Petitioners are three insurance companies¹ which were engaged in a declaratory judgment action with their insured,² bearing case caption *United Nuclear Corporation v. Cranford Insurance Company, et al.* (the UNC action). United Nuclear Corporation originally brought suit in New Mexico state court, but Petitioners removed the case to the United States District Court for the District of New Mexico on the basis of diversity jurisdiction. 28 U.S.C. §§ 1332 and 1441.

In order to facilitate settlement in the UNC action, and for good cause shown, the District Court entered a protective order on February 19, 1986, and an amended protective order on May 19, 1986. 22a-28a. These orders prevented public disclosure of thousands of documents produced by Petitioners to UNC.

In reliance on the protective order and for other consideration, the parties to the UNC action entered into a settlement agreement, dated June 30, 1986. The Settlement Agreement

¹Petitioner Cranford Insurance Company was incorporated by Delaware and has its principal place of business in New Jersey. Petitioner International Insurance Company has its principal place of business in Illinois and was incorporated by Illinois. Petitioner Sphere Drake Insurance is a British Corporation.

²The insured, United Nuclear Corporation, has its principal place of business in New Mexico and was incorporated by Delaware.

committed the parties to maintain the confidentiality of the discovery files. On August 28, 1986, the District Court dismissed the *UNC* litigation with prejudice and sealed the entire court file. 17a.

Respondents are numerous hazardous waste generators³ involved in four individual insurance coverage lawsuits with Petitioners in various courts. Respondents brought a Motion for Intervention in the U.S. District Court for the District of New Mexico on May 6, 1989 pursuant to Fed.R.Civ.P. 24(b). Intervention was sought to obtain relief from the protective orders entered in the *UNC* action. Respondents did not file a pleading with their motion as required by Fed.R.Civ.P. 24(c). Respondents made no showing of an independent basis for subject matter jurisdiction. On August 14, 1989, the District Court granted the Motion for Intervention, concluding that "Rule 24 intervention is the procedurally correct course" to obtain modification of the protective order entered in the *UNC* action. 12a.

The District Court found that the interpretation of environmental impairment insurance (EIL) policies issued by or through Petitioners Cranford Insurance Company and International Insurance Company, which was the subject of the *UNC* case, is common to the movants' pending litigation. The Court concluded that "[i]nformation obtained through discovery in the *UNC* case is therefore relevant to the movants' present litigation. . . . [A]llowing the movants access to the relevant information will avoid time consuming and costly duplication of discovery in accordance with the mandate of Fed.R.Civ.P. 1 to 'secure the just, speedy and inexpensive determination of every action.'" 12a.

³ Respondents are Rohm & Haas Corporation, South Macomb Disposal Authority, Chemical Waste Management and approximately 76 hazardous waste generators at the Enviro-Chem site in Zionsville, Indiana (the Enviro-Chem Generators). The Enviro-Chem Generators are seeking coverage as "insureds" under Enviro-Chem's policies with International Insurance Company and Cranford Insurance Company. Chemical Waste Management has its principal place of business in Illinois and was incorporated by Delaware.

Petitioners filed a motion in the District Court to stay the District Court's order pending appeal to the Tenth Circuit Court of Appeals. The Court denied Petitioners' motion. Petitioners then filed an Emergency Application for Stay of Order Pending Appeal with the Tenth Circuit Court of Appeals. This motion was likewise denied. 14a.

UNC released the materials covered by the protective order to Petitioners, who in turn produced the documents to Respondents ordered by the District Court.

B. The Decision Of The Court Of Appeals

Petitioners appealed from the District Court's Order to the Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1291. On June 15, 1990 the Court rendered its opinion affirming the District Court's decision. 1a. In affirming, the Tenth Circuit found that the "correct procedure for a non-party to challenge a protective order is through intervention for that purpose." 4a.

In so holding, the Court of Appeals recognized a three-way split in authority among the circuits regarding the burden of persuasion for modifying a protective order, and held that the party seeking to maintain the protective order bears the burden of proving tangible prejudice to substantial rights in order to avoid modification.

The Court of Appeals did not address the lack of an independent basis for federal subject matter jurisdiction. The Court observed that the District Court's "finding that interpretation of the EIL policies was a common issue between the instant case and the other suits . . . was a sufficient basis" for intervention under Fed.R.Civ.P. 24(b). 4a. Furthermore, the Court of Appeals did not address the fact that Respondents had failed to supply a pleading as required by Fed.R.Civ.P. 24(c).

REASONS FOR GRANTING THE WRIT

Importance of the Issue

A conflict exists among the circuit courts of appeal as to the standard by which protective orders may be modified to give a non-party access to pretrial discovery materials. It is a true and direct conflict, the resolution of which by grant of this Petition for a Writ of Certiorari will serve one of the prime purposes of this Court's certiorari jurisdiction by bringing about uniformity of decisions on this important federal subject among the circuit courts of appeal. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981). The cases which address this issue range in date from 1964 through 1990. The history and continuum of judicial opinions on this issue clearly demonstrate that this is a long-standing conflict in which eventual resolution and consensus among the circuits is unlikely to occur. The continued non-uniformity of standards applied on this crucial matter among the various circuits frustrates the intended purpose of Fed.R.Civ.P. 26(c).

Furthermore, the consequences of this continued conflict among the circuits, and in particular, the consequences of the rule adopted by the Seventh, Ninth, and Tenth Circuits favoring the modification of protective orders, chills the use of protective orders. The unwelcome result is the general intensification and prolongation of litigation, and the increased administrative burden on the courts. Petitioners believe the better approach is the rule adopted by the Second and Eighth Circuits, requiring a showing of extraordinary circumstances or compelling need before allowing modification of a protective order entered in a dismissed action.

If this Petition for Writ of Certiorari be granted, and the appropriate standard for modification of protective orders be definitively established, this Court will be resolving the issue for all pending and future cases. Without this Court's review and direction, the present conflict among the circuit courts of appeal will continue to have serious consequences for parties and witnesses relying on protective orders for

confidentiality. It can be anticipated that non-parties will continue to gain wholesale access to discovery materials tendered with the expectation of confidentiality, and no action in which a protective order is in place will ever be put to rest with finality.

Second, this case poses a fundamental jurisdictional issue. Recognizing "that the Constitution specifically vests [the power to expand the jurisdiction of federal courts] in the Congress, not in the courts,"⁴ this Court has consistently required adherence to statutory limitations on jurisdiction. This case raises such a question in the context of permissive intervention under Fed.R.Civ.P. 24(b)(2). Both the decisions of the District Court and the Tenth Circuit have allowed permissive intervention by non-parties despite the fact that entry of the intervenors destroyed the diversity jurisdiction in the original case. Failure to require an independent basis of jurisdiction conflicts with the principles underlying this Court's decisions in related contexts. The majority of circuits which have considered the question have required that a permissive intervenor show an independent basis of jurisdiction.

This Petition for Writ of Certiorari should be granted to clarify the limits of federal jurisdiction over permissive intervenors. Multi-party litigation is increasingly common and jurisdiction fundamentally determines much of the scope of judicial power. Bandes, *The Idea of a Case*, 42 Stanford L. Rev. 227, 250 (1990). Therefore, uniformity is necessary.

Finally, this case poses a fundamental question concerning interpretation of Fed.R.Civ.P. 24; specifically, whether a non-party seeking permissive intervention into a settled and dismissed lawsuit must file a pleading and advance an interest sufficient to support a claim or defense common to the main claim. The express language of Fed.R.Civ.P. 24, as well as substantial case law, and even express observations in an opinion of this Court, all indicate that these requirements

⁴*Snyder v. Harris*, 394 U.S. 332, 341-42 (1969).

must indeed be satisfied. Nevertheless, relying on conflicting jurisprudence, the courts below held otherwise. Because intervention of the nature concerned here is becoming increasingly common with the increase of multi-party litigation, uniformity on this issue is also necessary.

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A DIRECT CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THE STANDARD BY WHICH PROTECTIVE ORDERS IN DISMISSED CASES MAY BE MODIFIED TO GIVE A NON-PARTY ACCESS TO PRE-TRIAL DISCOVERY MATERIALS.

Lower courts have recognized that a valid protective order may only be disturbed upon a showing of cause, where non-parties attempt to intervene in a dismissed action to modify an existing protective order to gain access to discovery materials. However, a direct conflict of opinion exists among the federal courts of appeal regarding the standard a court should apply when weighing the interest of the non-party against the interests of parties and witnesses who have made disclosures in reliance on the validly entered protective order. This conflict is expressly noted in the Opinion of the Tenth Circuit below. 6a-7a.⁵

Fed.R.Civ. P. 26(c) authorizes a court to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Courts may temper the significant potential

⁵ As the Tenth Circuit recognized in its Opinion below, there is in fact a three-way split concerning this issue. The primary conflict will be addressed in the text that follows. The third conflicting standard is that promulgated by the Sixth Circuit Court of Appeals. The Tenth Circuit understood the Sixth Circuit to have left the decision as to how to balance the interests to the discretion of the trial court. *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 664 F.2d 114, 120 (6th Cir. 1981).

for abuse which is inherent in the liberal pretrial discovery permitted under the Federal Rules of Civil Procedure through the use of the protective order pursuant to Fed.R.Civ.P. 26(c). *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984).

Experience has shown that protective orders can play an especially important role in more complex litigation where they can encourage full disclosure of all evidence that might conceivably be relevant by providing protection against unwarranted public disclosure of that information. See *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979), which described this objective as representing the "cornerstone of our administration of civil justice." *Id.*

The Tenth Circuit's opinion recognized that protective orders "allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, 'to secure the just, speedy and inexpensive determination of every action.' Fed.R.Civ.P. 1" 5a. See also Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 2 (1983).⁶

The Tenth Circuit also noted that "the assurance of confidentiality may encourage disclosures that otherwise would be resisted." 5a-6a. Without such assurance, "witnesses relying on such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences." *Martindell*, 594 F.2d at 295.

⁶ As the author noted, however, "protective orders obviously are of little value if the parties cannot rely on them." 69 Cornell L.Rev. at 18. Should courts undermine the ability to rely on protective orders, their value and use will likely decline, thus destroying a valuable tool used by the courts to limit discovery abuse and to facilitate settlement. This is precisely the problem created where intervention by non-parties is allowed in closed litigation in order to modify an existing protective order.

The Opinion of the Tenth Circuit recognized that the potential for future modification of protective orders "tends to undermine the order's potential for more efficient discovery." 6a. Without a legal presumption favoring the continued efficacy of protective orders after a case is closed, settlement of litigation is inhibited, since the confidentiality provided by a protective order is often, as here, an integral part of the bargained for exchange in the settlement. Often the possibility of publication of confidential information in the course of a public trial is a motivating factor toward the resolution of litigation.

Unfortunately, the various circuit courts of appeal have pronounced conflicting standards regarding the modification of a protective order for the purpose of granting a non-party access to pretrial discovery in dismissed cases. The conflicting standards have been clearly discerned by the courts looking to the various circuits for direction on this issue.

The Second and Eighth Circuit Courts of Appeal have taken the position that the burden of persuasion resides with the party seeking modification of a validly entered protective order. See *Martindell*, 594 F.2d 291; *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), cert. den. sub nom. *Iowa Beef Producers, Inc. v. Smith*, 441 U.S. 907 (1979); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.* 529, F.Supp. 866, 894 (E.D. Pa. 1981); see also *FDIC v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982). These Courts would require a non-party intervenor to demonstrate some compelling need or extraordinary circumstance before considering any modification of a protective order.

The Seventh and Ninth Circuit Courts have taken a contrary position. They have created a presumption in favor of modification of valid protective orders, which can be overcome only upon a showing of tangible prejudice to substantial rights of the party opposing modification. See *Wilk v. American Medical Association*, 635 F.2d 1295, 1298 (7th

Cir. 1980); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264-266 (9th Cir.), cert. den., 379 U.S. 900 (1964).

The Tenth Circuit recognized the conflicting approaches adopted by the five circuit courts of appeals, as set forth above. It adopted the approach of the Seventh Circuit and quoted that court's decision in *Wilk*, 6-7a. The Tenth Circuit clearly recognized in its opinion that it was adopting a standard which was in conflict with the decisions of other circuit courts of appeal which had reviewed the issue. 6a.

If the Tenth Circuit had adopted the rule of law set forth in *Iowa Beef*, *Martindell* or *Zenith Radio Corp.*, Petitioners would have prevailed on the merits regarding the subject of the intervention at issue in this case. Under the standard set forth in those cases, Respondents would have had the burden of demonstrating a compelling need or extraordinary circumstance for obtaining a modification of the protective order.

Respondents would have failed to meet this burden since each Respondent was and is currently a litigant against one or more of the Petitioners, with all discovery rights granted by the Federal Rules of Civil Procedure or the applicable state court rules of discovery. Since the *UNC* protective order applies only to documents produced to *UNC* and not to the source documents from which copies were produced, there is no extraordinary circumstance or compelling need for modification of the valid protective order entered in the *UNC* matter — the documents are available to the Respondents through discovery in their separate actions if such discovery is warranted in their cases. Respondents may direct discovery to Petitioners in their separate cases thereby allowing Petitioners to raise objections based upon prejudice or irrelevancy, or to seek protective orders in *that* forum, before the judge most familiar with the issues therein joined. This approach removes the threat posed by non-parties who stand to obtain unfettered review of discovery materials previously produced in reliance on the confidentiality provisions contained in the protective order.

Efforts to modify a protective order pose special problems when a non-party seeks access to discovery materials gathered by parties in a settled and dismissed action. When parties evaluate the advantages of settling litigation over proceeding to trial, they should be entitled to place some value on the benefits of preserving the confidentiality of documents and avoiding the challenges to the use of documents not only at trial but at all times in the future.

Where, as in this case, the parties expressly conditioned settlement on the entry of an appropriate court order sealing pretrial discovery materials from public access, courts should presume the continued integrity of those orders whenever a later challenge arises. To shift the burden to the parties seeking to maintain the protective order in the face of a later challenge by non-parties will only serve to undercut the utility of protective orders in litigation. Should the courts adopt this standard, there is a very real likelihood that this useful and cost-efficient case management tool will no longer have a place in modern litigation.

The standard which has now been adopted by the Seventh, Ninth and Tenth Circuit Courts of Appeal in opposition to the decisions of the Second, Sixth and Seventh Circuits requires resolution by this Court. A clear and uniform standard should be available to give guidance to the courts, and to inform parties and witnesses contemplating disclosure during discovery as to whether the confidentiality promised by a Rule 26(c) protective order can be effectively maintained after settlement or dismissal of a civil action.

II.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER A COURT HAS JURISDICTION OVER A PERMISSIVE INTERVENOR WHICH LACKS AN INDEPENDENT BASIS OF JURISDICTION FOR ITS CLAIM

The District Court's jurisdiction in the original *UNC* action was based on the diversity of citizenship of the parties. 28 U.S.C. § 1332(a)(1). After the main case was dismissed, Respondents intervened pursuant to Fed.R.Civ.P 24(b)(2), which applies "when an applicant's claim or defense and the main action have a question of law of fact in common." One of Respondent-Intervenors, Chemical Waste Management, Inc., has its principal place of business in Illinois, as does original defendant International Insurance Company. Thus, diversity was destroyed and Respondents did not show a basis of federal jurisdiction. Certiorari should be granted to address the issue of whether the District Court had jurisdiction of the case where the permissive intervenors did not show independent grounds of federal jurisdiction.

A. The Result Of The Tenth Circuit's Decision Conflicts In Principle With Applicable Decisions Of This Court

Federal courts are courts of limited jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978) ("*Kroger*"). In addition to limitations imposed by the Constitution, federal court jurisdiction is limited by acts of Congress. *Kroger*, 437 U.S. at 372. Defining the reach of federal judicial power is, therefore, a primary issue of statutory interpretation.

The relevant statute in this case is 28 U.S.C. § 1332(a)(1), which gives to federal courts jurisdiction over 'civil actions where the matter in controversy exceeds the sum or value of \$50,000 . . . and is between . . . citizens of different States' (emphasis added). Courts have consistently found this statute

to require complete diversity of citizenship. *Strawbridge v. Curtiss*, 7 U.S. 267 (1806); *Kroger*, 437 U.S. at 374 and n. 13. Thus, a federal court lacks jurisdiction under § 1332(a)(1) “unless each defendant is a citizen of a different State from each plaintiff.” *Kroger*, 437 U.S. at 373 (emphasis in original).

This case clearly presents the question of the limits of diversity jurisdiction in the context of intervention under Rule 24 of the Federal Rules of Civil Procedure, a context which has been acknowledged as “in a state of some confusion.” 3B, J. Moore & J. Kennedy, *Moore’s Federal Practice*, ¶ 24.18[3] (2d ed. 1987); see also 7C, C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1917 (2d ed. 1986) (“the difficulties presented by the ancillary jurisdiction concept are a problem for each of the joinder devices the Civil Rules makes available but nowhere else are the problems as acute as with intervention under Rule 24”). Specifically, in a case founded on a federal court’s diversity jurisdiction, must intervention by a permissive right be supported by jurisdictional grounds independent of those supporting the original case?

Issues concerning the lower courts’ jurisdiction to entertain a case are fundamental, as any federal court “must, *sua sponte*, satisfy itself of its power to adjudicate in every case and at every state of the proceeding. . . .” *Harris v. Illinois-California Express, Inc.*, 687 F.2d 1361, 1366 (10th Cir. 1982); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). Whether a permissive intervenor must have a basis of jurisdiction independent of that in the main case implicates the primary principle noted by Chief Justice Marshall in 1807 that “courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.” *Finley v. United States*, 57 U.S.L.W. 4557, 109 S.Ct. 2003, 104 L.Ed.2d 593, 600 (1989), quoting *Ex Parte Bollman*, 8 U.S. 75, 93 (1807).

In some situations, a federal court may exercise ancillary jurisdiction over matters not supported by an independent jurisdictional basis. 7C, *Wright & Miller*, § 1917, p. 460;

Kroger, 437 U.S. at 375, n.18. Relying on this concept of ancillary jurisdiction, courts have allowed intervention by those with a right to intervene under Rule 24(a) in a case grounded on diversity even though the intervenor destroys diversity. See *Kroger*, 437 U.S. at 375 (“The ancillary jurisdiction of the federal courts . . . has been said to include cases that involve multiparty practice, such as compulsory counterclaims, impleader, cross-claims or intervention as of right.”) (citations omitted). Whether ancillary jurisdiction also applies to permissive intervention, however, has not been squarely addressed. Following this Court’s rationale in related contexts, Petitioners assert the issue should be addressed by this Court and that the answer can only be “No.”

Situations, as here, involving the addition of parties invoke important considerations. “[W]ith respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.” *Finley*, 57 U.S.L.W. at 4558, 104 L.Ed.2d at 601. In reviewing situations involving the addition of parties, this Court has focused on “an examination of the posture in which the non-federal claim is asserted and the . . . specific statute that confers jurisdiction over the federal claim.” *Finley*, 57 U.S.L.W. at 4558, 104 L.Ed.2d at 602-03; *Kroger*, 437 U.S. at 373. The Court noted that “the most significant element of ‘posture’ or ‘context’ [in the subject case] is precisely that the added claims involved added parties over whom no independent basis of jurisdiction exists.” *Finley*, 57 U.S.L.W. at 4558, 104 L.Ed.2d at 603. “Mere factual similarity” between the claims involving the added party and those brought in the original case is insufficient to confer additional jurisdiction on the federal court. *Id.* That similarity is “of no consequence since neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction.” *Finley*, 57 U.S.L.W. at 4558, 104 L.Ed.2d at 603, quoting *Kroger*, 437 U.S. at 376-77.

The instant case is in the same basic posture as was involved in *Kroger* and *Finley* — where jurisdiction was found lacking — because “the added claims involved added parties over whom no independent basis of jurisdiction exists.” *Finley*, 57 U.S.L.W. at 4558, 104 L.Ed.2d at 603. The asserted reasons for intervention here — convenience of the litigants and considerations of judicial economy (at 3a) — are insufficient to confer additional jurisdiction, just as those reasons were insufficient in *Kroger* and *Finley*.

Nor could the District Court’s finding that intervention was otherwise proper under Rule 24(b)(2) because of the presence of common issues of law or fact confer a basis of jurisdiction. Rule 24 does not by its terms so provide, nor can it in view of Fed.R.Civ.P. 82 which rejects the notion that a rule of civil procedure can extend the statutory limitations on jurisdiction. Rule 82 provides “[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein.” See *Int’l. Paper Co. v. Inhabitants of Town of Jay, Me.*, 887 F.2d 338, 346 (1st Cir. 1989) (“Rule 24(b) cannot break down *jurisdictional* barriers to intervention.”) (emphasis in original).

A third significant aspect of the posture of this case is that the added claim was brought by a party in an offensive position, a factor deemed significant by this Court in *Kroger*. There the Court observed that “ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court.” *Kroger*, 437 U.S. at 376. By contrast, both *Kroger* and this case involve attempts by plaintiffs to invoke the jurisdiction of a federal court. In that situation, having “chosen the federal rather than the state forum”, the plaintiff “must thus accept its limitations.” *Id.*

Applying this reasoning to the instant case demonstrates the absence of jurisdiction over Respondents’ claims. Here, Respondents are involved in cases in other courts in which discovery can be and has been sought. To allow them to

reassert the same claims brought in other courts in a federal forum while ignoring the jurisdictional limitations of the federal court is nothing more than a baseless attempt to rewrite 28 U.S.C. § 1332(a)(1).

The second factor this Court examined in *Kroger* and *Finley* is the text of the particular statute involved. As noted above, 28 U.S.C. § 1332(a)(1), which authorizes the federal courts to take jurisdiction of suits between citizens of different states, has been consistently found to require complete diversity between the parties. Examining this statute in *Kroger*, this Court expressly found the federal court lacked jurisdiction of a claim against a third party defendant after the action against the primary defendant was dismissed, in the absence of an independent basis of federal jurisdiction. "The plain language of the statute" simply could not encompass the case since "citizens of [the same state] were [on both sides of the litigation]". *Kroger*, 437 U.S. at 374. Cases involving permissive intervenors which have no independent jurisdictional grounds, as here, involve an identical result. Here, by allowing entry into the case by a citizen of Illinois, diversity has been destroyed contrary to the clear mandate of 28 U.S.C. § 1332(a)(1).

This case conflicts in result with this Court's decisions involving the claims of additional parties where no independent basis of jurisdiction exists. The Petition for Writ of Certiorari is warranted so as to prevent unjustified extension of the bounds of federal court jurisdiction beyond those mandated by Congress. To allow the Tenth Circuit's decision to stand would result in the wholesale disregard of this Court's restrictive views on jurisdiction of additional parties.

B. Certiorari Should Be Granted Because The Tenth Circuit's Decision Conflicts In Result With The Circuit Courts of Appeal On an Important Matter of Federal Law Regarding The Requirement of An Independent Basis For Subject Matter Jurisdiction In Cases Involving Permissive Intervention.

The Tenth Circuit's opinion conflicts in result with the majority of the Circuit Courts Appeal that have considered whether jurisdiction exists over a permissive intervenor which lacks its own basis for jurisdiction.

The majority of circuits refuses permissive intervention unless the intervenor can show that an independent basis for jurisdiction exists with regard to its claim. *See Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir.), cert. den., 475 U.S. 1011 (1985); *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49 (1st Cir. 1979); *Reedsburg Bank v. Apollo*, 508 F.2d 995 (7th Cir. 1975); *Beach v. KDI Corp.*, 490 F.2d 1312 (3d Cir. 1974); *Francis v. Chamber of Commerce of United States*, 481 F.2d 192 (4th Cir. 1973); *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531 (8th Cir. 1970); *Blake v. Pallan*, 554 F.2d 947 (9th Cir. 1977); *Int'l. Paper Co. v. Inhabitants of the Town of Jay, Me.* 887 F.2d 338 (1st Cir. 1989). Under this line of authority, Respondent-Intervenors' claims should have been dismissed because of the lack of independent subject matter jurisdiction.

Certiorari should be granted to avert any possible expansion of federal jurisdictional limits. If the Tenth Circuit's decision stands, it could provide dangerous precedent for the view that jurisdiction exists even when a permissive intervenor lacks a basis of jurisdiction. This is not unlikely in view of the recognized confusion in this area, *see* 3B, J. Moore & J. Kennedy, *Moore's Federal Practice*, ¶ 24.18[3] (2d ed. 1987); 7C, C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1917 (2d ed. 1986), and in view of some lower court decisions declining to follow the majority rule. *See e.g.*

Northeast Clackamas County Electric Co-Operative v. Continental Casualty Co., 221 F.2d 329 (9th Cir. 1955) (even if intervention was permissive only, intervenor not required to have independent grounds of jurisdiction); *United States v. Local 638, Enterprise Ass'n of Steam, Hot Water, Hydraulic, Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning & General Pipefitters*, 347 F.Supp. 164 (S.D.N.Y. 1972) (not requiring independent ground of jurisdiction).

This Court should address this matter where the Tenth Circuit's decision conflicts with the bulk of the authority on the issue. The District Court's decision to extend its jurisdiction runs contrary to the unambiguous language of Fed.R.Civ.P. 82 and 28 U.S.C. § 1332(a). A court's extension of its jurisdiction cannot be countenanced in the absence of statutory authority, as to do so impinges upon an area which is left to the sole discretion of Congress. *See Snyder v. Harris*, 394 U.S. 332, 341-42 (1969) ("If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.").

III.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 24(c) AND RESOLVE A CONFLICT CONCERNING WHETHER PERMISSIVE INTERVENTION UNDER RULE 24(b)(2) REQUIRES THAT AN APPLICANT FILE A PLEADING AND ADVANCE AN INTEREST SUFFICIENT TO SUPPORT A LEGAL CLAIM OR DEFENSE COMMON TO THE MAIN ACTION.

The courts below recognized Respondents' "right" to intervene in this closed, dismissed action without filing a pleading and advancing an interest sufficient to support a legal claim

or defense, as clearly contemplated by Fed.R.Civ.P. 24.⁷ 4a; Fed.R.Civ.P. 24(b),(c). When so doing, the courts relied upon a nucleus of cases which generally construed “technical,” yet significant noncompliance with Rule 24 as inconsequential, while discounting the Rule’s fundamental purpose. Other courts, however, have denied intervention to applicants who have failed to strictly adhere to the Rule’s pleading and claims requirement. Certiorari should thus be granted here not only to clarify the disagreement concerning Rule 24(c)’s pleading requirement, but also to resolve an apparent conflict concerning whether permissive intervention under Rule 24(b)(2) requires that an applicant advance an interest sufficient to support a legal claim or defense in the main action.

By its unambiguous terms, Fed.R.Civ.P. 24(b)(2) expressly conditions permissive intervention in a civil action upon an “applicant’s claim or defense and the main action having a question of law or fact in common.” Under Rule 24(c), permissive intervention, as well as intervention of right, then requires a timely application by an appropriate motion, “accompanied by a pleading setting forth the claim or defense for which intervention is sought.”

Not surprisingly, permissive intervention under Rule 24(b)(2) has thus been interpreted to require that a purported intervenor have an interest sufficient to support a legal claim or defense in the main action. Indeed, in *Diamond v. Charles*, 476 U.S. 54, 77-78 (1986), which rejected a private pediatrician’s alleged standing to attempt to intervene and defend the validity of a state abortion statute, Justice O’Connor, concurring along with Chief Justice Burger and Justice Rehnquist, observed:

Diamond’s cause is not helped by Rule 24(b)(2), for he fails to satisfy the Rule’s requirement, which has remained intact since it was first adopted in 1938, that

⁷ Petitioners raised this issue below as part of their arguments on standing and untimeliness. 33a-34a.

“an applicant’s claim or defense and the main action have a question of law or fact in common.” The words “claim or defense” manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as confirmed by Rule 24(c)’s requirement that a person desiring to intervene serve a motion stating “the grounds therefor” and “accompanied by a pleading setting forth the claim or defense for which intervention is sought.” Thus, although permissive intervention “plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation,” *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940), it plainly does require an interest sufficient to support a legal claim or defense which is “founded upon [that] interest” which satisfies the Rule’s commonality requirement. *Id.*, at 460. Dr. Diamond simply has no claim or defense in this sense; he asserts no actual, present interest that would permit him to sue or be sued by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation.

Consistent with these observations, several courts have accepted the unambiguous terms and import of Rule 24, as requiring a motion accompanied by a pleading which sets forth a claim or defense. *See Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987) (Fed.R.Civ.P. 24(c) “requires that the motion to intervene shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.”); *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 761 (2d Cir. 1968) (holding that a reference in motion papers to an original complaint does not comply with the Rule 24 requirement that intervention application must be accompanied by a pleading); *Arvida Corp. v. City of Boca Raton*, 59 F.R.D. 316, 323 (S.D.Fla. 1973) (“The *claim or defense* asserted pursuant to Fed.R.Civ.P. 24(c) must be meritorious to justify intervention and the motion to dismiss filed herein clearly is

not. (emphasis supplied)); *cf. also Bender v. Williamsport Area School District*, 475 U.S. 534, 548 & n.9 (1986) (School principal sued in official capacity had "no right" to participate in court in his parental capacity "without first filing an appropriate motion or pleading setting forth the claim or defense he desired to assert" pursuant to Fed.R.Civ.P. 24(a), (c)).

The reasoning adopted by the courts below in allowing intervention by the non-parties here, however, directly conflicts with the foregoing. The reasoning below, which was based upon *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir.), cert. den., — U.S. —, 109 S.Ct 838, 102 L.Ed. 2d 970 (1989), is inconsistent with the express requirements of permissive intervention under Rule 24(b)(2). 4a. It also exceeds the Rule's purpose and scope — to assure the orderly use of intervention by *parties* interested in litigating substantive issues common to the matter in which intervention is sought.

On its face, the language in *Public Citizen* seemingly undermines its own logic. Initially the court announced that it was "not willing to create a special category of non-Rule 24 intervention for third parties who wish[ed] to challenge protective orders through informal motion." *Id.* at 784. However, this was the decision's actual effect, because by their very nature the non-party "intervenor" admittedly did not, and could not, comply with Rule 24, being unable to file the necessary pleadings and advance an interest sufficient to support a legal claim or defense. Apparently recognizing this, the court in *Public Citizen*, at 858 F.2d 784, observed:

... Under similar circumstances, other federal courts have been quite lenient in permitting participation by parties who failed to comply strictly with Rule 24. In [*In re*] *Beef Industry Antitrust Litigation*, 589 F.2d [786] at 788-89 [(5th Cir. 1979)], the Fifth Circuit, while setting down a prospective Rule 24 intervention requirement, was willing to overlook a failure to comply with Rule 24 in a discovery access case in light of "the fact

that the district court's acts might be considered equivalent to authorizing intervention." The Third and Eighth Circuits have also overlooked a lack of formal compliance when the district court afforded relief to a non-party and thus implicitly granted it intervenor status. . . . We think that a similar approach is appropriate here.

Public Citizen and its underlying jurisprudence thus effectively allow intervention by non-parties under Rule 24, although Rule 24 does not "technically" apply in such a circumstance and although this technical "noncompliance" represents a significant departure from Rule 24's express requirements and clear purpose, *i.e.* requiring the filing of a motion accompanied by a pleading which advances an interest sufficient to support a legal claim or defense. While announcing an unwillingness to create a "special category of non-Rule 24 intervention," the court in *Public Citizen* thus did so anyway. This, in turn, provided the courts below in this matter with a legal basis, however ill-reasoned and inconsistent with Rule 24, for doing likewise.

Accordingly, a Writ of Certiorari should be granted to clarify the pleading requirements of Rule 24(c) and resolve the conflict noted concerning the status of applicants seeking permissive intervention under Rule 24(b)(2). Otherwise, the current status of the law in the Tenth Circuit, and other Circuits as well, will continue to make available avenues for sham intervention, the otherwise unnecessary reopening of closed cases, and wastefully duplicative discovery litigation.

THE QUESTIONS PRESENTED ARE NOT MOOT

Respondents may argue that, because the materials covered by the protective order were released to them over Petitioners' objections and unsuccessful efforts to obtain a stay, the issues now raised are moot and therefore outside the Court's jurisdictional authority. However, this Court has traditionally recognized that it should decide the merits of a

claim that may be otherwise moot, when the claim is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *see also Honig v. Doe*, 484 U.S. 305, 318 & n.6 (1988). The Court has also recognized, in *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), that in the absence of a class action this exception to the mootness doctrine applies when:

- (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and
- (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

There is no doubt that the facts here satisfy the first part of the *Weinstein* test, as being "too short to be fully litigated prior . . . to cessation or expiration." *Id.* at 149. Petitioners could not obtain complete review of the merits of the pertinent decisions below before Petitioners were compelled by court order to turn over the materials to Respondents. The challenged action here is therefore analogous to that appealed in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), and *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985), both of which similarly involved the rejection of mootness claims in a protective order context.

This Court in *Gannett Co. v. DePasquale*, 443 U.S. at 377, recognized that a protective order issued to prevent dissemination of discovery prior to trial was likely to be "too short in its duration to permit full review." In *In re Reporters Committee for Freedom of the Press*, the Circuit Court for the District of Columbia then considered whether a sealing order in effect until the end of trial could meet this test. Judge Scalia, writing for the court, identified the issue as being "whether, without considering the possibility of expedited review (which would of course make the evading review test virtually impossible to meet), a sealing order is normally insusceptible of review before completion of the trial in the case in which it was entered." 773 F.2d at 1329. The court then went on to hold that such orders would evade review,

because they usually would last no longer than two years — the typical period between the beginning of discovery and completion of trial — and this period had been held by this Court to be “short enough to cause action which would be mooted if not reviewed in time to evade that review.” 773 F.2d at 1329 (citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. at 514-16).

Although this case involves a protective order that remained in effect, and was not challenged, until after settlement and dismissal, the posture of the challenged action and the questions presented are effectively the same as those in *Gannett Co. v. DePasquale* and *In re Reporters Committee for Freedom of the Press*. Notwithstanding the protective order’s duration or when it was challenged, Petitioners here likewise could not obtain complete review of the merits of the decisions rendered below. The materials covered by the protective order were released to Respondents over Petitioners’ objections and unsuccessful efforts to obtain a stay, before Petitioners could exhaust their remaining avenues of appeal. In this context, the challenged action thus sufficiently “evades review” so as to satisfy the first part of the *Weinstein* test. *C & C Products, Inc. v. Messick*, 700 F.2d 635, 637 (11th Cir. 1983) (First part of *Weinstein* test satisfied when complete review of merits of protective order modification could not be obtained before protected materials were released to non-party by party in possession).

It is equally clear that the facts here likewise satisfy the second part of the *Weinstein* test, by supporting a “reasonable expectation that the same complaining party [will] be subjected to the same action again.” 423 U.S. at 149. As insurers who have offered environmental impairment liability protection, a highly specialized product, Petitioners have been, and continue to be, involved in numerous lawsuits in state and federal courts throughout the country. Because of their inherent nature, involving the interpretation of substantial data in the form of documents and extensive depositions of experts and other technicians, these lawsuits invariably

have involved, and will involve, the entry of comprehensive protective orders to facilitate discovery and settlement. Moreover, in these other cases Petitioners will likewise be subject to additional claims by non-parties seeking to gain access to otherwise “protected” materials based upon a claim to discovery in an unrelated action. Indeed, this case, where several non-parties involved in separate lawsuits in different states — not merely one non-party in one unrelated suit — sought to intervene and modify a protective order, clearly demonstrates that the circumstances here are not isolated and unlikely to recur as to these specific Petitioners. The very nature of the insurance business dictates that these Petitioners will be involved in other lawsuits in which protective orders are entered and non-parties also move to intercede and modify these orders.

As the Court has noted, the concern on this point is whether the challenged action is reasonably “capable of repetition,” and not that the likelihood of recurrence be established with mathematical precision. *Honig*, 484 U.S. at 318 n.6. When measured against other pertinent decisions of this Court, the circumstances giving rise to the dispute here are thus at least as “capable of repetition,” if not more so, to preclude dismissal on grounds of mootness. *See* cases noted in *Honig*, at 484 U.S. 318 n.6. Accordingly, the facts here satisfy both parts of the *Weinstein* test, and the issues now raised are ripe for consideration of the merits and not moot.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Tenth Circuit entered in this matter on June 15, 1990.

Respectfully submitted,

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October 13, 1990

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PUBLISH

FILED
JUNE 15, 1990

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED NUCLEAR CORPORATION,
Plaintiff,

v.

CRANFORD INSURANCE COMPANY, now
known as AMERICAN SPECIAL RISK
INSURANCE COMPANY, a Delaware
Corporation; SPHERE INSURANCE COMPANY,
LTD., now known as SPHERE DRAKE
INSURANCE, PLC, a British Corporation;
INTERNATIONAL INSURANCE COMPANY, an
Illinois Corporation,
Defendants-Appellants,

and

No. 89-2205

NORTHBROOK EXCESS AND SURPLUS
INSURANCE COMPANY, formerly known as
NORTHBROOK INSURANCE COMPANY, an
Illinois Corporation,
Defendant,

ROHM & HAAS COMPANY; SOUTH MACOMB
DISPOSAL AUTHORITY; WASTE MANAGEMENT,
INC.; CHEMICAL WASTE MANAGEMENT, INC.;
GENERATORS OF WASTE AT THE ENVIRONMEN-
TAL CONSERVATION AND CHEMICAL
CORPORATION SITE, in Zionsville, Indiana,
Intervenors-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV 85-880-M)

John A. Klecan of Butt, Thornton & Baehr, Albuquerque, New Mexico, for Defendants-Appellants.

Bruce D. Drucker (Matthew W. Cockrell and Michelle J. Gilbert, also of Rivkin, Radler, Dunne & Bayh, Chicago, Illinois, for Intervenor-Appellees Waste Management, Inc., Chemical Waste Management, Inc. and SCA Services, Inc.; Donald W. Kiel of Pitney, Hardin, Kipp & Szuch, Morristown, New Jersey, for Intervenor-Appellee Rohm & Haas Co.; and Philip B. Davis, Albuquerque, New Mexico, for Intervenor-Appellees, with him on the brief).

Before LOGAN, SEYMOUR, and BRORBY, Circuit Judges.

LOGAN, Circuit Judge.

Defendants Cranford Insurance Company (Cranford), Sphere Insurance Company, and International Insurance Company (International) appeal from an order of the district court which allowed Rohm & Haas Company, South Macomb Disposal Authority, Waste Management, Inc., Chemical Waste Management, Inc., and numerous generators of waste at the Environmental Conservation and Chemical Corporation site in Zionsville, Indiana, (Intervenors) to intervene in this action, and which modified a protective order and an order sealing the record to permit Intervenor access to discovery for use in collateral federal and state litigation with defendants.

Plaintiff United Nuclear Corporation (UNC) filed the instant action in 1985, seeking a declaration of liability under environmental impairment liability (EIL) insurance policies issued by defendants. To facilitate discovery, the district court entered a stipulated protective order, pursuant to Fed. R. Civ. P. 26(c), declaring all discovery materials to be confidential and prohibiting their use or disclosure other than for preparation for or use at trial. In 1986, the parties settled; the district court dismissed the suit with prejudice, sealed the

record and file "until further order of the Court," I R. tab 136, and ordered that depositions not be disclosed except on order of a court of competent jurisdiction. Pursuant to the settlement agreement, documents produced by defendants were to be retained at UNC's expense for ten years. Defendants-Appellants Brief-in-Chief at 2.

Intervenors are all litigants in suits in other state and federal courts seeking determinations that they have coverage under EIL insurance policies issued by defendants Cranford and International. In 1989, they sought to intervene in the instant suit for the sole purpose of seeking modification of the protective order and the order sealing the record to permit them access to discovery produced in this lawsuit for use in their actions against defendants in other courts. The district court granted permissive intervention under Fed. R. Civ. P. 24(b) and modified its prior orders to allow Intervenors access to discovery for use in their collateral litigation. The court placed Intervenors under the same restrictions as the original parties: they could use and disclose the information solely for litigation purposes. Defendants have appealed, and we affirm.

I

Intervenors challenge our jurisdiction to hear this appeal. Although most orders granting intervention or modification of a protective order are interlocutory and not immediately appealable, intervention here was solely for the purpose of seeking modification of the protective order; the underlying controversy had already been concluded. Therefore, we believe the orders at issue are appealable, either as final orders, *see Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 293-94 (2d Cir. 1979), or collateral orders, *see Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1298 (7th Cir. 1980). Therefore, we proceed to the merits.

II

Defendants initially challenge the district court's grant of permissive intervention under Fed. R. Civ. P. 24(b). Of course, permissive intervention is a matter within the sound discretion of the district court, and we will not disturb its order except upon a "showing of clear abuse." *Shump v. Balka*, 574 F.2d 1341, 1345 (10th Cir. 1978).

The courts have widely recognized that the correct procedure for a nonparty to challenge a protective order is through intervention for that purpose. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989). When a collateral litigant seeks permissive intervention solely to gain access to discovery subject to a protective order, no particularly strong nexus of fact or law need exist between the two suits. *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 164 (6th Cir. 1987). Here, the district court allowed intervention on a finding that interpretation of the EIL policies was a common issue between the instant case and the other suits. This was a sufficient basis.

Defendants argue that intervention three years after a case has settled is precisely the sort of undue delay and prejudice that Rule 24(b) prohibits. While it is true that an application for intervention must be timely, "[t]imeliness is to be determined from all the circumstances," and "the point to which the suit has progressed . . . is not solely dispositive." *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). The most important circumstance in this case is that intervention was not on the merits, but for the sole purpose of challenging a protective order. Rule 24(b)'s timeliness requirement is to prevent prejudice in the adjudication of the rights of the existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose. See *Public Citizen*, 858 F.2d at 786-87; *Meyer Goldberg*, 823 F.2d at 161-62. We find nothing improper

in allowing intervention to challenge a protective order still in effect, regardless of the status of the underlying suit.

III

Defendants also object to the district court's modification of the protective order. As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed. See *Public Citizen*, 858 F.2d at 781-82; *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir.), cert. denied, 484 U.S. 953 (1987). And modification of a protective order, like its original entry, is left to the discretion of the district court. See *Wyeth Laboratories v. United States District Court*, 851 F.2d 321, 323 (10th Cir. 1988).

The protective order in this case was entered by stipulation of the parties and designated all materials produced in discovery as confidential. The order restricted use and disclosure unless a party challenged the confidentiality of a particular item. These stipulated "blanket" protective orders are becoming standard practice in complex cases. See *Manual for Complex Litigation, Second*, §21.431 (1985). They allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1; see generally *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356-57 (11th Cir. 1987); Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 9-11 (1983).

No doubt such an order makes the discovery process in a particular case operate more efficiently; the assurance of confidentiality may encourage disclosures that otherwise would

be resisted. Allowing modification of protective orders for the benefit of collateral litigants tends to undermine the order's potential for more efficient discovery. But when a collateral litigant seeks access to discovery produced under a protective order, there is a countervailing efficiency consideration—saving time and effort in the collateral case by avoiding duplicative discovery. In striking this balance, some circuits have adopted a presumption in favor of the continued integrity of the protective order, *see, e.g., Agent Orange*, 821 F.2d at 147-48 (protective orders modifiable only under extraordinary circumstances),¹ others have tipped the balance in favor of avoiding duplicative discovery, *see, e.g. Wilk*, 635 F.2d at 1299; *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264-66 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964), and still others have simply left the balancing to the discretion of the trial court, *see, e.g., Stavro v. Upjohn Co. (In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.)*, 664 F.2d 114, 120 (6th Cir. 1981). We find ourselves in agreement with the standard laid down by the Seventh Circuit in *Wilk*:

“[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.”

¹ Other courts have assumed that the Second Circuit’s “extraordinary circumstances” test applies only when the government is the collateral litigant seeking to avoid duplicative discovery, because of the government’s vast investigatorial resources and power for oppression. *E.g., Wilk*, 635 F.2d at 1299-1300. Indeed, the Second Circuit acknowledged this as the basis for the test in *Palmieri v. New York*, 779 F.2d 861, 866 (2d Cir. 1985). *Agent Orange*, while purporting to apply an extraordinary circumstances standard, when confronted with a private collateral litigant, upheld modification based only upon the fact that the protective order was a “blanket” one. But, as discussed above, such orders are routine in complex cases.

635 F.2d at 1299 (citations omitted).

Defendants' desire to make it more burdensome for Intervenor to pursue their collateral litigation is not legitimate prejudice. *Id.* at 1300-01. As the district court recognized, any legitimate interest the defendants have in continued secrecy as against the public at large can be accommodated by placing Intervenor under the restrictions on use and disclosure contained in the original protective order. *See id.* at 1301; *Olympic Refining*, 332 F.2d at 265-66. The district court, therefore, did not abuse its discretion in modifying the protective order.

Having said that, we also should note the limits of the district court's continuing jurisdiction over this matter. The district court was within its power and discretion to modify the protective order, but because the underlying controversy was no longer alive, "the court simply lacked power to impose any new, affirmative requirements on the parties relating to discovery." *Public Citizen*, 858 F.2d at 781; *cf. Smith v. Phillips*, 881 F.2d 902, 905 (10th Cir. 1989) (district court had no power to order the parties to disclose the terms of settlement agreement resulting in stipulated dismissal, when the settlement was not of record or subject to any court order).

In any event, the district court must refrain from issuing discovery orders applicable only to collateral litigation. "[F]ederal civil discovery may not be used merely to subvert limitations on discovery in another proceeding. . . [and] a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation." *Wilk*, 635 F.2d at 1300. While the district court here properly granted collateral litigants access to discovery under its protective order, "[q]uestions of the discoverability in the [collateral] litigation of the materials discovered in [this] litigation are, of course, for the [collateral] courts." *Superior Oil Co. v. American Petrofina Co.*, 785 F.2d 130, 130 (5th Cir. 1986). Because defendants

Cranford and International are parties to the collateral suits, they have both the interest and standing to raise in those courts any relevancy or privilege objections to the production of any materials. See *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 91 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

AFFIRMED.

FILED
AUGUST 14, 1989

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED NUCLEAR CORPORATION,
Plaintiff,

v.

CRANFORD INSURANCE COMPANY,
now known as **AMERICAN SPECIAL RISK**
INSURANCE COMPANY, a Delaware
corporation; **SPHERE INSURANCE**
COMPANY, LTD., now known as **SPHERE**
DRAKE INSURANCE, PLC, a British
corporation; **INTERNATIONAL INSURANCE**
COMPANY, an Illinois corporation; and
NORTHBROOK EXCESS AND SURPLUS
INSURANCE COMPANY, formerly known
as **NORTHBROOK INSURANCE COMPANY** an
Illinois corporation,
Defendants.

No. 85-880-M
Civil

**MEMORANDUM OPINION
AND
ORDER**

This matter came on for consideration of a motion to intervene and modify an existing protective order. Having considered the motion and response and being otherwise fully advised in the premises, I find that the motion is well taken in part and it will be granted in part and denied in part.

Background

In 1985, United Nuclear Corp. (UNC) sought a declaratory judgment of coverage under its environmental impairment liability (EIL) insurance policies. The UNC case was dismissed with prejudice following settlement in 1986. Various parties now seek to intervene in order to modify the UNC protective order so that they can gain access to certain discovery documents.

The proposed intervenors are Rohm and Haas Co., South Macomb Disposal Authority (SMDA), Waste Management, Inc. and Chemical Waste Management, Inc. (Waste Management), and numerous generators of waste at the Environmental Conservation and Chemical Corp. site in Zionville, Indiana (Enviro-chem). These movants are presently parties in declaratory judgment actions around the country that also involve EIL insurance coverage. Enviro-chem, Waste Management, and SMDA each seek to recover insurance proceeds from International Insurance Co. and Cranford Insurance Co., now known as American Special Risk Insurance Co. (ASRIC), in separate lawsuits. Movant Rohm & Haas seeks to recover insurance proceeds from International Insurance Co.

As discussed above, the movants seek to intervene in the UNC case for the limited purpose of gaining access to discovery material. Specifically, movants request that the protective order issued by this court in the UNC case be modified to include them within the definition of "authorized persons" and to permit the use of information solely in their own lawsuits, subject to the terms of the protective order.

All of the pending lawsuits involve questions of EIL policy interpretation, as did the UNC action. Discovery is at various stages in each of the four pending lawsuits. Most significantly, in the Enviro-chem litigation a federal Magistrate ordered the production of documents which explain the meaning of policy forms 1276 and 1080, but limited discovery in two respects. First, the EIL carriers are not required to produce

documents from underwriting or claims files of individual EIL policyholders or applicants, other than Enviro-chem, at this time. Second, the Magistrate refused to order the general managing agent for EIL insurance in North America to produce documents in its possession. In addition, in the SMDA litigation, a discovery motion has been taken under advisement by the court and an order is pending.

Discussion

The question of whether to unseal court records and modify an existing protective order to allow access to discovery, even after the parties relied on the initial order in settlement, is "left to the sound discretion of the trial court." *Meyer Goldberg, Inc. of Lorain v. Fischer Foods*, 823 F.2d 159, 161 (6th Cir. 1987) (citations omitted). After considering the numerous arguments raised by defendants, I find that modification of the initial order is appropriate in this case.

Defendants first argue that the motion should be denied because it is untimely. Defendants point out that the protective order has been in place since 1986 and that movants must have known before now that the UNC file contained documents that they desired. To determine the issue of timeliness, I must consider whether the opposing party will suffer undue delay or prejudice. *Id.* Given that the motion to intervene is for the sole purpose of obtaining discovery, I find that the defendants' argument is not persuasive. Courts have routinely granted motions to intervene solely for access to discovery after a case has settled. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 786, cert. denied, 109 S. Ct. 838 (1989). See also *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988) (four years after settlement). Modification of the protective order will have no effect on the final disposition of the UNC case. Defendants have not shown that they will suffer greater prejudice, if any, now than they would have suffered at any time in the past.

Defendants next argue that movants lack standing to intervene in the UNC case. However, I find that the interpretation of EIL policies issued by or through defendants Cranford/ASRIC and International, which was the subject of the UNC case, is common to the movants' pending litigation. Information obtained through discovery in the UNC case is therefore relevant to the movants' present litigation. See *National Union Fire Insurance Co. v. Continental Illinois Corp.*, 116 F.R.D. 78 (N.D. Ill. 1987). Movants have a legitimate interest in seeking modification of the UNC protective order. Rule 24 intervention is the procedurally correct course for them to follow. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d at 783. Moreover, allowing the movants access to the relevant information will avoid time consuming and costly duplication of discovery in accordance with the mandate of Fed.R.Civ.P. 1 to "secure the just, speedy and inexpensive determination of every action."

Finally defendants argue that they should be able to rely on the sealing of the UNC file because it was a bargained for term of their settlement with UNC. This argument is also unpersuasive. Movants have agreed to be bound by the terms of the protective order and seek only limited, relevant information from the file, which defendants would be obligated to duplicate and produce in the pending lawsuits. Defendants therefore will not lose the benefit of the settlement for which they bargained.

What is of concern to me, however, is that several of the courts in which the movants' suits are pending have issued or may be about to issue orders limiting the scope of discovery allowed. In the interest of comity, I will not allow my present ruling to conflict with the orders of those courts. This order therefore is not to be construed so as to negate any existing court order or order pending as of the date this order is filed.

The motion to intervene is hereby granted. The motion to unseal the court file and modify the existing protective order

is granted as follows. Movants Enviro-chem, Waste Management, and SMDA, along with their respective counsel, are within the definition of "authorized persons" and shall have access to pleadings and discovery documents that pertain to the underwriting, claims information, and development of policy interpretation of EIL policies issued by or through defendants International Insurance Co. and Cranford Insurance Co./ASRIC, absent any court order issued or pending to the contrary on this date. Movant Rohm & Haas and counsel are within the definition of "authorized persons" and shall have access to pleadings and discovery documents that pertain to the underwriting, claims information, and development of policy interpretation of EIL policies issued by or through International Insurance Co., absent any court order issued or pending to the contrary on this date. All intervening parties shall use the information obtained solely for the purpose of litigating their current lawsuits and shall be otherwise fully bound by the terms of the existing protective order.

IT IS SO ORDERED.

/s/
Senior United States District Judge

FILED
APRIL 17, 1990

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

v.

CRANFORD INSURANCE COMPANY, now
known as AMERICAN SPECIAL RISK
INSURANCE COMPANY, a Delaware
Corporation; SPHERE INSURANCE COMPANY,
LTD., now known as SPHERE DRAKE
INSURANCE, PLC, a British Corporation;
INTERNATIONAL INSURANCE COMPANY, an
Illinois corporation,
Defendants-Appellants,

No. 89-2205

and

NORTHBROOK EXCESS AND SURPLUS
INSURANCE COMPANY, formerly known as
NORTHBROOK INSURANCE COMPANY, an
Illinois corporation,
Defendant.

ORDER

Before LOGAN and BRORBY, Circuit Judges.

This matter is before the court on the motion of defendants-appellants for reconsideration of the court's September 14, 1989, order denying a motion for emergency stay pending appeal.

Upon consideration thereof, the motion is denied for the reason that appellants have failed to present any new arguments showing a likelihood of success on appeal.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ PATRICK FISHER

Patrick Fisher
Chief Deputy Clerk

FILED
APRIL 6, 1990

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED NUCLEAR CORPORATION,
Plaintiff,

v.

CRANFORD INSURANCE COMPANY, et al.,
Defendants.

No. 85-880-M
Civil

ORDER

This matter came on for consideration of defendants' motion for reconsideration and clarification of my order entered March 21, 1990 and defendants' motion to exceed page limit on exhibits. In their response, intervenors request attorney fees for responding to defendants' motion. Having considered the motions, response, and being otherwise fully advised in the premises, I find that defendants' motions are not well taken and they are denied. Intervenor's motion for attorney fees is well taken and it will be granted in accordance with my order of March 21, 1990.

IT IS SO ORDERED.

/s/
Senior United States District Judge

FILED
AUGUST 28, 1986

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED NUCLEAR CORPORATION,
a Delaware corporation,
Plaintiff,

No. CIV 85-0880-M

vs.

ENTERED ON DOCKET
8/28/86

CRANFORD INSURANCE COMPANY,
et al.,
Defendants.

ORDER

AND NOW on Motion of Cranford Insurance Company, now known as American Special Risk Insurance Company; Sphere Insurance Company, Ltd., now known as Sphere Drake Insurance, PLC; and International Insurance Company, for good cause shown,

IT IS ORDERED:

1. That the Court record and file in this cause be, and the same hereby is, sealed until further order of the Court.
2. That the depositions taken, including exhibits marked, in this case not be disclosed to anyone unless disclosure is required by law or by Order of a Court of competent jurisdiction.

/s/ EDWIN L. MECHEM
Edwin L. Mechem
U.S. District Judge

**STEPHENSON, CARPENTER,
CROUT & OLMSTED**

By /s/ G. STANLEY CROUT
G. Stanley Crout
Attorneys for Plaintiff

MONTGOMERY & ANDREWS

By /s/ MICHAEL W. BRENNAN
Michael W. Brennan
Attorneys for Defendant
Northbrook Excess and Surplus
Insurance Company, now known
as Allstate Insurance Company

**RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.**

By /s/ CHARLES B. LARRABEE
Charles B. Larrabee
Attorney for Defendants
Cranford Insurance Company, now
known as American Special Risk
Insurance Company; Sphere
Insurance Company, Ltd., now
known as Sphere Drake
Insurance, PLC; and International
Insurance Company.

FILED
AUGUST 28, 1986

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED NUCLEAR CORPORATION,
a Delaware corporation,
Plaintiff,

No. CIV 85-0880 M

vs.

CRANFORD INSURANCE COMPANY, et al.,
Defendants.

ORDER

AND NOW on stipulation of the parties, for good cause shown,

IT IS ORDERED that plaintiff's complaint and first amended complaint, and all claims and causes of action which were or could have been stated therein, be, and the same hereby are, dismissed with prejudice, each party to bear its own costs herein.

/s/ EDWIN L. MECHEM
Edwin L. Mechem
U.S. District Judge

1

FILED
AUGUST 28, 1986

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED NUCLEAR CORPORATION,
a Delaware corporation,
Plaintiff,

vs.

No. CIV 85-0880 M

CRANFORD INSURANCE COMPANY,
et al.,
Defendants.

STIPULATION FOR DISMISSAL

The parties, through their respective counsel of record, hereby stipulate and agree that the matters in controversy between them have been compromised and settled and, subject to the approval of the Court, an Order may be entered dismissing plaintiff's complaint and first amended complaint, with prejudice, with each of the parties to bear its own costs herein.

**STEPHENSON, CARPENTER,
CROUT & OLMSTED**

By /s/ G. STANLEY CROUT
G. Stanley Crout
Attorneys for Plaintiff
Post Office Box 669
Santa Fe, NM 87504-0669

**RODEY, DICKASON, SLOAN, AKIN
& ROBB, P. A.**

By /s/ CHARLES B. LARRABES
Charles B. Larrabes
Attorneys for Defendants
Cranford Insurance Company, now
known as American Special Risk
Insurance Company; Sphere Insur-
ance Company, Ltd., now known
as Sphere Drake Insurance, PLC;
and International Insurance
Company.

Post Office 1888
Albuquerque, New Mexico 87103

MONTGOMERY & ANDREWS

By /s/ MICHAEL W. BRENNAN
Michael W. Brennan
Attorneys for Defendant North-
brook Excess and Surplus Insur-
ance Company, now known as
Allstate Insurance Company.
Post Office Box 2307
Santa Fe, New Mexico 87054-2307

**FILED
FEBRUARY 19, 1986**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**UNITED NUCLEAR CORPORATION,
*Plaintiff,***

vs.

**CRANFORD INSURANCE COMPANY,
now known as AMERICAN SPECIAL
RISK INSURANCE COMPANY, a
Delaware corporation; SPHERE
INSURANCE COMPANY, LTD., now
known as SPHERE DRAKE
INSURANCE, PLC, a British
corporation; INTERNATIONAL
INSURANCE COMPANY, an Illinois
corporation; and NORTHBROOK
EXCESS AND SURPLUS INSURANCE
COMPANY, formerly known as
NORTHBROOK INSURANCE COMPANY,
an Illinois corporation,
*Defendants.***

No. 85-0880-M (C)

STIPULATION AND PROTECTIVE ORDER

IT IS HEREBY STIPULATED AND AGREED by the parties to this action that the Court may, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, enter the attached Protective Order without further notice to the parties.

Dated this 11th day of February, 1986.

Submitted By:

STEPHENSON,
CARPENTER, CROUT
& OLMSTED

RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.

By /s/ STEPHEN J. LAUER

Stephen J. Lauer
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By /s/ HENRY M. BONHOFF

Henry M. Bonhoff
P.O. Box 1888
Albuquerque,
New Mexico 87103
Attorneys for Defendants
Cranford Insurance Com-
pany, now known as Amer-
ican Special Risk Insurance
Co.; Sphere Insurance Co.,
Ltd., now known as Sphere
Drake Insurance, PLC; and
International Insurance Co.

MONTGOMERY &
ANDREWS

By /s/ MICHAEL W. BRENNAN

Michael W. Brennan
325 Paseo de Peralta
Santa Fe,
New Mexico 87501
Attorneys for Defendant
Northbrook Excess & Sur-
plus Insurance Co., for-
merly known as North-
brook Insurance Co.

PROTECTIVE ORDER

Upon the foregoing stipulation of the parties and pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, it is hereby ordered that:

1. All documents and other materials produced in discovery, or copies thereof, by the parties to this action are deemed to be "Confidential Information" to be protected by the provisions of this Order unless a party requests the Court to determine that particular material is not confidential and the Court so determines.

2. Confidential information may only be disclosed as follows:

(i) To an attorney retained by a party, counsel for a party, or an attorney employed by a party.

(ii) To a member of the paralegal, secretarial, or clerical staff (including shorthand reporters) assisting an attorney qualified as a recipient pursuant to subparagraph (i), above.

(iii) To an employee or former employee of a party whose duties include or included assisting the party in connection with the subject matter of the litigation between the parties.

(iv) To a consultant or expert employed by an attorney who is qualified as a recipient pursuant to subparagraph (i), above, in connection with this action.

(v) In trial, depositions, pleadings, interrogatories, or other court proceedings or court papers in this action.

(vi) To the court and its personnel.

3. Confidential information shall be held in confidence by each person to whom it is disclosed pursuant to this Order, to be used only for purposes of litigation, including but not limited to preparation for and at trial. Confidential Information shall not be disclosed to anyone except as provided in

this Order, by further Order of this Court, or by stipulation of the parties.

4. Nothing contained in the provisions of this Order shall be deemed to preclude any party at any time from seeking and obtaining from the Court, on an appropriate showing, additional protection pursuant to Rule 26(c), including an Order that the material should not be produced at all.

5. If a party produces a particular document to another party, the producing party shall be deemed to have waived any claim of privilege which might attach to that particular document; provided that production of a particular document shall not be deemed to constitute a waiver of privilege with respect to any other document nor shall it constitute a waiver of privilege with respect to the subject matter of particular documents produced.

6. This Order shall not limit or affect a producing party's right to disclose documents or other discovery materials produced by that party.

Dated this 19 day of February, 1986.

/s/
United States District Court Judge

AMENDED PROTECTIVE ORDER

Upon the foregoing stipulation of the parties and pursuant to Rule 26(c) of the Federal Rules of Civil procedure, it is hereby ordered that:

1. All documents and other materials (or copies thereof) produced in discovery, whether by the parties to this action or by nonparties, and all recordings of, notes of, and transcriptions of depositions, whether of parties or nonparties, are deemed to be "Confidential Information" protected by the provisions of this Order unless a party requests the Court to determine that particular material is not confidential and the Court so determines. This Order applies to all the above-described materials, including those requested, created, or produced before the date of the Order or flowing from discovery accomplished before the date of the Order.

2. Confidential information may only be disclosed as follows:

(i) To an attorney retained by, counsel for, or an attorney employed by a party to this action.

(ii) To a member of the paralegal, secretarial, or clerical staff (including shorthand reporters) assisting an attorney qualified as a recipient pursuant to subparagraph (i), above.

(iii) To an employee or former employee of a party whose duties include or included assisting the party in connection with the subject matter of the litigation between the parties.

(iv) To a consultant or expert employed by an attorney who is qualified as a recipient pursuant to subparagraph (i), above, in connection with this action.

(v) In trial, depositions, pleadings, interrogatories, or other court proceedings or court papers in this action.

(vi) To the court and its personnel.

3. Confidential information shall be held in confidence by each person to whom it is disclosed pursuant to this Order, to be used only for purposes of litigation, including but not limited to preparation for and at trial. Confidential information shall not be disclosed to anyone except as provided in this order, by further Order of this Court, or by stipulation of the parties.

4. Nothing contained in the provisions of this Order shall be deemed to preclude any party at any time from seeking and obtaining from the Court, on an appropriate showing, additional protection pursuant to Rule 26(c), including an Order that the material should not be produced at all.

5. If a party produces a particular document to another party, the producing party shall be deemed to have waived, with respect to this action, any claim of privilege which might attach to that particular document; provided that production of a particular document shall not be deemed to constitute a waiver of privilege with respect to any other document nor shall it constitute a waiver of privilege with respect to the subject matter of particular documents produced.

6. This Order shall not limit or affect a producing party's right to disclose documents produced by the party.

7. Every document produced prior to the date of this order by a party, Alexander Howden Insurance Services, The London Agency, and Charles Humpstone, is deemed authenticated and within the business records exception to the hearsay rule; provided, that any party may, within thirty days of the date of this order, notify the other parties that it is objecting to one or more specified documents, and will not agree that they are authenticated and within the business records exception to the hearsay rule. If, after the date of this order, any additional documents are produced by a party or non-party, the documents will be deemed authenticated and within the business records exception to the hearsay

rule; provided, that any party may, within ten days of the date of production of such documents, notify the other parties that it is objecting to one or more specified documents, and will not agree that they are authenticated and within the business records exception to the hearsay rule. All deposition exhibits marked to date, with the exception of Exhibits 83, 93 and 94, are deemed authenticated and within the business records exception to the hearsay rule.

Dated this 19th day of May, 1986.

/s/

United States District Court Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

No. CIV-85-0880 M

CRANFORD INSURANCE COMPANY,
et. al.,
Defendants.

**RESPONSE OF DEFENDANTS, CRANFORD,
SPHERE AND INTERNATIONAL, TO THE "EIL
INSUREDS" MOTION TO INTERVENE AND MOD-
IFY PROTECTIVE ORDER**

I.

INTRODUCTION

The present motion for the "intervenors"¹ asks the Court to reopen this case, which was dismissed with prejudice following settlement three years go. The avowed purpose of resurrecting the action is to obtain a "very narrow class of document." document." In In fact, the Intervenors demand access to *all* pleadings, *all* documents produced by three of the Defendants-Insurers (Cranford, Sphere and International), and *all* deposition transcripts which, in any manner, relate to the environmental impairment liability (EIL) insurance. It will be clear to the Court that no attempt was made to limit the request to the issues in the respective cases, nor even to

1 The status of some of the proposed intervenors ("certain generators at the Enviro-Chem site") as "insureds" is disputed, since they were never named on an EIL policy and never paid a premium or negotiated for an insurance contract. Consequently, all of the insureds will be referenced as "Intervenors."

comply with the orders and guidelines which limit discovery in those cases. In fact, in at least one of the cases, the Court denied a request for discovery concerning other insured (such as UNC) and ruled that this type of information was not relevant.

Importantly, the Intervenors in the present motion are asking this Court to set aside three separate protective orders which prohibited the disclosure of the materials exchanged in this case, forbade the dissemination of deposition transcripts, and sealed the Court's record and file. If this Court grants their motion, it would be acting in contravention of the applicable law concerning both intervention and the modification of protective orders. Equally as important from the standpoint of practicality and comity, this Court would be forced to become involved in proceedings concerning the relevancy of the UNC case pleadings, documents and deposition transcripts in terms of the particular facts and legal issues involved in each of the four Intervenors' separate and distinct cases.

II.

COUNTERSTATEMENT OF FACTS

This case was initially filed in state court by the United Nuclear Corporation ("UNC") on May 24, 1985 against four of its insurance carriers seeking coverage for claims resulting from seepage from UNC's uranium tailings ponds. This matter was subsequently removed to this Court. During discovery, documents were produced by all of the parties and depositions were taken regarding the circumstances of the loss and the availability of insurance coverage.

The parties settled this case on June 30, 1986. The terms of the settlement included that all documents produced in this case, including those produced by the EIL Insurers, were to be returned to the producing parties, and that the

parties agreed to seek an order requiring the non-disclosure of the depositions (and the exhibits) and the sealing of the court file. An Order dated August 28, 1986 specified that the court record and file for this case was to be sealed and that the depositions taken, including exhibits, were not be disclosed to anyone. On that same date, this Court entered an Order of Dismissal with Prejudice.

In the course of the litigation, this Court entered a Protective Order on February 19, 1986 and an Amended Protective Order on May 19, 1986, both of which were pursuant to the stipulation of the parties and FRCP 26(c). The May, 1986 Amended Protective Order continues in force as supplemented by the terms of the August, 1986 Order.

Paragraph 1 of the Amended Protective Order provided that all documents produced in discovery and all recordings and transcriptions of depositions were to be deemed "Confidential Information." This Order forbade the disclosure of any confidential information to any person other than parties (or their agents) involved in the UNC litigation. Paragraph 5 of the Order provided that a party producing documents did not waive its claims of privilege with respect to the UNC litigation. A substantially similar provision was found in Paragraph 5 of the initial Protective Order.

A few preliminary comments concerning the Intervenor's version of the status of their respective cases is warranted. Initially, it should be noted by this Court that Intervenor's constitute some of the world's largest corporations whose businesses involve the generation and disposal of enormous amounts of hazardous wastes. The size and financial resources of any one of the Intervenor's dwarfs the combined resources of the EIL Insurers. Consequently, this Court is definitely not faced with a request by parties without the financial ability to obtain the full measure of relevant discovery available in each of their respective cases. Secondly, the same EIL Insurers are not involved in each of the Intervenor's separate cases and do not correspond to the EIL Insurers

involved in the UNC litigation with the result that the presently proposed request would encompass the production of information from Insurers not involved in each of the other four matters.

The Enviro-Chem Litigation

The generators in the Enviro-Chem suit have already obtained all of the EIL Insurers' (Cranford and International) documents which the magistrate has deemed relevant to the issues in that case. Their present request for "all" EIL-related documents and deposition transcripts ignores the limits placed on discovery by the court in that case.

The Waste Management Litigation

Intervenor Waste Management submitted an expansive discovery request for which the Insurers (Cranford, International and ISLIC) provided timely answers, raised appropriate objections, and submitted responsive documents. Since the filing of the Insurers' objections to the production of certain documents on February 5, 1988, Waste Management has not filed a motion contesting the validity of the objections nor otherwise sought any further discovery.

The Rohm and Haas Litigation

Intervenor Rohm and Haas submitted a wide ranging set of interrogatories and document requests in its New Jersey litigation. International, the only EIL Insurer involved in that action, has been ready, willing and able to exchange non-privileged documents since the first week of March, and it has been Rohm and Haas which has repeatedly delayed to exchange of documents.

The South Macomb Disposal Authority (SMDA) Litigation

In the fourth case, SMDA also has filed numerous interrogatories and a request for documents. Answers and objections by the EIL Insurers (Cranford and International) were provided on April 5, 1989. On June 5, 1989, a comprehensive

motion which will define the scope of permissible discovery in that action was taken under advisement by the Court. No decision has yet been rendered on that motion, but Cranford and International have agreed to provide some of the documents requested pending the Court's decision on the motion.

In summary, each of the other cases is in the middle of the discovery process. The judges in those cases have been actively involved in resolving both substantive and procedural issues, and the EIL Insurers respectfully assert that those judges are better suited (by being more familiar with the facts of those cases and the differing laws of the four jurisdictions) to determine questions of relevancy and privilege in those actions than this Court. It becomes evident that the Intervenor's stated purpose of cost savings and judicial efficiency will actually result in increased cost and duplicative judicial review of the discovery process.

III.

THE PRESENT MOTION FOR PERMISSIVE INTERVENTION SHOULD BE DENIED AS BEING UNTIMELY.

The "EIL Insureds" make no assertion that their Motion for Intervention is as of right pursuant to FRCP Rule 24(a). Consequently, the defendants will assume that they are seeking permissive intervention pursuant to FRCP Rule 24(b), which provides:

Upon timely application any one may be permitted to intervene (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Preliminary, the Intervenor's have not, and cannot, comply with the requirement of FRCP Rule 24(c) that a motion to intervene "shall be accompanied by a pleading setting

forth the claim or defense for which intervention is sought.” The proposed request for production of documents attached to the present motion is not a “pleading” under FRCP Rule 7. Moreover, the Intervenor cannot comply with this requirement not only because no common question of law or fact exists between the UNC case and any of the other cases, but also because the issues in the UNC litigation were forever settled and laid to rest when the case was dismissed with prejudice in August 1986.

Federal case law uniformly holds that regardless of whether the leave to intervene is sought under section (a) or (b) of FRCP rule 24, the application must be timely. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 Sup. Ct. 2464, 53 L. ed. 2d 423 (1977); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977). A test for the “timeliness” of a request for intervention as first stated by the court in *Stallworth* has been utilized by many of the other circuits, including the Tenth Circuit in the case of *Sanguine, Ltd. v. United States Dept. of Interior*, 736 F.2d 1416 (10th Cir. 1984). As summarized by the Court in *Sanguine*, the four facts in determining the timeliness of a motion to intervene are: “the length of time since the applicant knew of his interest in the case, prejudice to the existing parties [if intervention is granted], prejudice to the applicant [if intervention is denied], and the existence of any unusual circumstances.” 736 F.2d at 1418.

In another intervention decision, the Tenth Circuit affirmed a trial court’s denial of a non-party’s motion to intervene as a matter of right when the movant knew of the litigation for three and one-half years. *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987). The decision against intervention was additionally based upon the fact that the initial case had been concluded and that intervention, if permitted, would have raised substantial new issues. 821 F.2d at 539.

The EIL Insurers are presently unaware as to the date when the Intervenor either separately or collectively became aware of the UNC litigation, but, at a minimum, the Intervenor

were aware of the UNC litigation before April of 1988 because documents referencing the UNC protective orders were attached to a motion filed at that time by Waste Management in its case.

The *Jicarilla Apache* case also addressess the second factor, prejudice to then existing parties. The present motion was filed approximately three years after the settlement of this case and would raise substantial new issues concerning the discoverability of documents. Many of these questions were previously avoided in this case by the agreement of the parties and the order of this Court, but would need to be argued and decided if intervention were now permitted.

The EIL Insurers additionally assert that both the Fifth Circuit in *Stallworth* and the Tenth Circuit in *Saguine* considered 'prejudice to the parties' in the context of still active litigation and the impact the intervention would have on discovery, motions and/or trial. However, the EIL Insurers state that if this Court were to grant the Motion to Intervene, they would be prejudiced to an even greater degree since the UNC case has been concluded for several years.

Specifically, the EIL Insurers would be prejudiced because the documents produced to UNC and now requested by the Intervenor includes information which is privileged and irrelevant to the Intervenor's cases. Consequently, the EIL Insurers would be required to reassemble the documents produced to UNC (all of which are not now in one location as asserted by the Intervenor), re-review for privilege and relevance, (in relation to the Intervenor's four cases) and then file the appropriate objections and/or motions to preserve the non-discoverable status of certain documents. This process would require a considerable expenditure of additional time and money on the part of the EIL Insurers. The EIL Insurers assume that one of the unspoken, motivating factors behind the present motion is the Intervenor's interest in obtaining documents and other materials without regard to the constraints of privilege and relevancy which the courts would

properly impose on such requests in their own cases. Such a tactic should not be countenanced by this Court.

The EIL Insurers would be additionally prejudiced, in that, the sealing of the court's record and file and the non-disclosure of the documents produced and the depositions taken was part of the consideration for the settlement of the case. These actions were bargained for by the EIL Insurers in UNC and were expressly incorporated into the settlement agreement.

On this point, the court in *FDIC v. Ernst & Ernst*, 92 F.R.D. 468 (E.D. N.Y. 1981), *aff'd* 677 F.2d 230 (2nd Cir. 1982), specifically refused to modify a protective order upon finding that the sealing of certain documents was part of the consideration for the settlement. The Court found that the benefit of settling cases outweighed the public's right to access in certain instances.

Although the EIL Insurers cannot speak for UNC, that company could also be prejudiced if "all documents" produced by the EIL Insurers were now made available to the Intervenor. Not surprisingly, any of those documents reference UNC, and contain information which that company considered to be confidential.

The third factor, prejudice to the applicants if their request is denied, is not even discussed by the Intervenor in their motion and brief. Clearly, whatever documents are relevant in the Intervenor's respective cases can be obtained through the discovery process in each of their ongoing cases. Interestingly, one of the intervening parties, the Enviro-Chem generators, has admitted that it is only seeking "potentially relevant" documents [P. 5 of the Intervenor's Memorandum of Law]. This fishing expedition into the files and discovery materials of an unrelated case is primarily for the purpose of circumventing the discovery in their own cases and should not be permitted by this Court.

As stated by the Tenth Circuit in its *Sanguine* decision, "courts are normally reluctant to grant a motion to intervene

at a late stage in the proceedings or after entry of judgment.” 736 F.2d 1416. The *Sanguine* court reversed the trial court and granted intervention only after finding that the intervenor would have otherwise been prejudiced. The New Mexico Supreme Court has similarly held that requests for intervention (pursuant to New Mexico’s intervention rule which is identical to FRCP Rule 24), which are made after the conclusion of a case, should be denied unless the intervention is required to preserve a right otherwise not protectible. *Richins v. Mayfield v. Ryan*, 85 N.M. 578, 514 P.2d 854 (N.M. 1973). See also, *Comal County Rural High School District v. Nelson*, 158 Tex. 564, 314 S.W.2d 956 (1958); *First Alief Bank v. White*, 682 S.W.2d 251 (Tex. 1984), in which post-judgment intervention is never permissible.

The New Mexico Supreme Court in the case of *Apodaca v. Town of Tome Land Grant*, 86 N.M. 132, 520 P.2d 552 (1974) held that timeliness is a threshold requirement in determining an application for intervention and then denied intervention finding that it would have been “more sympathetic to the appellants’ position if intervention were the only way in which they could establish their claims and protect their interest.” Similarly, the present Intervenor has not asserted that any of the documents produced or any of the deponents in the UNC litigation are now unavailable, and thus there would be no prejudice to the Intervenor’s right or abilities to obtain relevant discovery in their respective cases.

The fourth factor concerns the existence of unusual circumstances militating either for or against a determination that an application for intervention is timely. As interpreted and applied in various decisions, this factor presently appears to be inapplicable in this instance, in that, there has been no representation made by the intervenors that their tardiness in presenting their Motion for Intervention in the UNC case is excusable due to extenuating circumstances.

For the foregoing reasons, the EIL Insurers assert that the Intervenor cannot request intervention without first satis-

fying the requirement of timeliness as recognized by the Tenth Circuit and request that their Motion for Intervention be denied.

IV.

THE INTERVENORS LACK STANDING TO SEEK AND OBTAIN MODIFICATION OF THE PROTECTIVE ORDERS IN UNC CASE.

The Tenth Circuit considered whether a non-party has standing to seek the modification of a protective order in *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984). Holding that an intervenor must show: (1) an actual injury traceable to an act of the defendant; and (2) that the injury can be redressed by the requested action [citing *Valley Forge Christian College v. AUSCS, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L.Ed 2d 700 (1982)], the Tenth Circuit denied the requested modification based upon a finding that Oklahoma Publishing Company (OPUBCO), a non-party, did not have a standing to complain about the existence of duly entered protective orders covering documents obtained through discovery, because the documents had not entered the area of public access. The Court held that even assuming that the non-party had been "injured" by the party's refusal to provide it with the documents which were produced in the case, the Court lacked the power to redress the injury because the requested documents were no longer under its supervisory control. 748 F.2d at pp. 1424-25. See also, *Booth Newspapers v. Midland Circuit Judge*, 377 N.W.2d (Mich. App. 1985) (a non-party lacked standing to seek modification of a stipulated protective order as it concerned non-public documents).

On this point, a trial court's jurisdiction over a matter generally terminates upon entry of a judgment or order of dismissal. *Littlejohn v. BIC Corp.*, 851 F.2d 673, 683 (3rd

Cir. 1988). In *Littlejohn*, the Third Circuit was faced with a situation which is remarkably similar to the present one, in that, a non-party attempted to intervene and obtain access to documents which were produced under a protective order, but which were returned to the producing party after the conclusion of the case. Although the Third Circuit ruled that the Intervenor could inspect documents still in the Court's possession *and* which had become part of the public judicial record *through their use at trial*, the trial court was without the power, absent allegations of fraud or other extraordinary circumstances, to require litigants to return documents for review and copying by third parties. 851 F.2d at p. 683.

The holding in these cases are analogous to the present situation, in that, the documents produced to UNC by the EIL Insurers (and now being sought by the Intervenor) were never utilized in a public hearing or filed with this Court. Moreover, they have been returned to the EIL Insurers. Consequently, the present motion to modify should be denied because this Court lost the power to provide the requested relief and to compel discovery upon its entry of the Order of Dismissal on August 28, 1986.

V.

**THIS COURT'S ORDERS OF MAY 8, 1986 AND
AUGUST 28, 1986 SHOULD NOT BE MODIFIED
IN THE ABSENCE OF A COMPELLING NEED
OF THE EIL INSURED OR EXTRAORDINARY
CIRCUMSTANCES.**

The Tenth Circuit has not yet promulgated a test for when (or if) a non-party should be permitted to obtain modification of a duly entered protective order, other than its decision in *OPUBCO*. However, other circuits and state appellate courts have set out tests for determining the appropriateness of a request to modify a protective order which, if applied

to the present set of facts, clearly indicate that the EIL Insureds should not be granted their request for modification of the protective orders in this case. For example, in the widely cited case of *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291 (2nd Cir. 1979), the Second Circuit Court of Appeals held that:

absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need . . . a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation, either as evidence or as the subject of a possible perjury charge.

Other cases in which the *Martindell* test was applied include: *Rogers V. Proctor & Gamble Co.*, 107 FRD 351 (E.D. Mo. 1985); *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2nd Cir. 1982); *Palmieri v. State of New York*, 779 F.2d 861 (2nd Cir. 1985); and *Meyer Goldberg, Inc. v. Fisher Foods*, 823 F.2d 159, 162 (6th Cir. 1987).

The Second Circuit in *Martindell* refused to permit the modification of a protective order to allow the United States to obtain deposition transcripts for a criminal investigation on the basis of "expediency" or "efficiency." With regard to the first aspect of the test considered in *Martindell*, the intervenors have not asserted that there was any improvidence on the part of this Court when it entered the two protective orders and its Order of August 1986. As to the "extraordinary circumstances," if a federal appeals court refused a request of the United States government to modify a protective order for the purpose of aiding a criminal investigation and found that such a purpose was not a sufficiently compelling need or extraordinary circumstance, then the present request of the EIL Insureds certainly does not constitute

an "extraordinary circumstance" or "compelling need," and should be denied.

Other federal and state courts have determined that a protective order should not be modified pursuant to a non-party's request without satisfying the *Martindell* criteria. *Iowa Beef Processors, Inc. v. Galey*, 601 F.2d 954 (8th cir. 1979); *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 106 FRD 551, 554 (S.D. N.Y. 1985); *aff'd* 797 F.2d 85 (2nd Cir. 1986). The *Hayden* court held that four factors were to be considered in deciding whether to permit a non-party's request to modify a protective order:

- (1) the nature of the protective order;
- (2) the degree of reliance upon the order by the protected party;
- (3) the status of the parties requesting the modification; and
- (4) the government's role in the dispute, if the government is a third party.

The propriety of this Court's orders and the status of the parties requesting the modification have already been discussed above, and the fourth factor (the government's role) is inapplicable in this instance.

However, the most relevant factor to the present situation is the second which concerns the degree of reliance placed upon the existence of the order by the protected party. As previously stated, the parties' agreement to the continued confidentiality of the materials submitted in this matter was part of the consideration for the settlement. If the EIL Insurers had known that they could not rely on the inviolability of the protective orders when they settled this case, it is doubtful that this case would have settled at the time and under those terms.

Moreover, EIL Insurers' knowledge that the production of their documents would be made pursuant to an order,

which protected against inadvertent waiver of privilege, allowed the review and production of large numbers of documents in a very limited time. The Insurers relied on the Court's Order to review over 12,000 documents for privilege and production in a single day.

Additionally, if this court had denied either the entry of the Amended Protective Order or this August, 1986 Order, the EIL Insurers would have been compelled to take additional steps in an attempt to obtain the protection of these documents. The safeguards the Insurers relied on to meet a very ambitious discovery schedule should not now be removed for the illusory justification of "cost effectiveness" and "judicial efficiency" as put forth by the Intervenor. In fact, the federal district judge in the *H. L. Hayden* case denied a non-party's request for modification of a protective order which had been based upon the same assertion, specifically holding that the movant's justification of a savings in time and money was a "well worn adage" and was insufficient to justify a modification. 106 FRD at p. 557.

The Intervenor asserts a willingness to be bound by a "similar" protective order if intervention is granted. However, their recent actions in this case indicate otherwise. A review of the exhibits attached to the Intervenor's motion indicates that they have already violated the very protective orders which they claim that they will follow if intervention is granted when they gained access to, reviewed, and attached pages from this Court's docket for the UNC case. The August 1986 Order sealed this Court *record* as well as its files. It can be assumed that the Intervenor has reviewed the entire court record, if not also the pleadings, in direct and knowing violation of this Court's Orders.

The EIL Insurers question the credibility of the Intervenor when they assert their good faith adherence to this Court's orders and the preservation of the protected nature of the requested materials. This Court should be aware of the fact that several of the Intervenor have provisions in

their respective protective orders granting them the right to share documents with certain non-party insureds — in addition to the present group of Intervenor.

Many of the cases that the Intervenor cite in support of the modification of protective orders involve news agencies seeking access to confidential information provided in the course of civil litigation. See, for example, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 Sup. Ct. 2199, 81 L. ed. 2d 17 (1984). The Court in that case considered the public release of confidential information *which has become part of a public proceeding such as a motion hearing or trial*. Absent such exposure to a public forum, information submitted under the terms of a protective order will retain its privileged status. 467 U.S. at p. 37; 81 L. ed. 2d at p. 29. Similarly and importantly to the present case, there is no absolute right under either the common law or the Constitution for the public to inspect and copy judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306, 55 L. ed. 2d 570, 580 (1978); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

Numerous cases have followed the court's holding in *Seattle Times* and found that an unrelated third party intervenor cannot obtain the modification of a protective order so as to publicize information gained in the course of pre-trial discovery unless such information had been, in some way, already made available to the public. Absent this fact, "no court of record has extended the public right of access to pre-trial depositions, interrogatories, and documents gained through discovery." *Mokhiber v. Davis*, 537 A.2d 110 (D.C. App. 1983); see also, *The Courier Journal v. Marshall*, 828 F.2d 361, 366 (6th Cir. 1987); *United States v. Anderson*, 799 F.2d 1438 (11th Cir. 1986); *State of New Mexico v. Brennan*, 98 N.m. 109, 645 P.2d 982 (1982); and *Tavoulareas v. The Washington Post Co.*, 724 F.2d 1010 (1984) [in which the Court reinstated a seal on deposition transcripts not used at trial].

The two cases upon which the Intervenor's rely in arguing for modification are easily distinguishable. In *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964), the court permitted the modification of the protective order in that case upon finding that the non-party's *only* source of the requested information was the documents under seal. That fact is not present in this case. As previously stated, the information requested by the Intervenor's in this case, to the extent that it is relevant, should be obtainable in their own actions.

In *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980) the Court permitted the modification of the protective order and the dissemination of protected documents only after determining that the complaints filed in the two actions were virtually identical. Significantly, the *Wilk* court also held that "a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation." 635 F.2d at 1300.

Unlike *Wilk*, the Complaints in the Intervenor's cases and the UNC case are not "virtually identical" but are vastly dissimilar both when compared with each other and when compared with the UNC Complaint. Moreover, the present request by the Intervenor's would provide them with discovery to which they would not have a right in their own cases.

A separate part of the Intervenor's request is directed toward the unsealing and disclosure of the pleadings filed by the EIL Insurers in this case. On the issue of the sealing of a court file, the Tenth Circuit in *Crystal Growers Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1989) denied a request to unseal a court file and held that a court has "discretionary power to control and seal, if necessary, records and files in its possession." Moreover, the possibility that the unsealing of a court's file would provide a non-party with access to documents which would be otherwise non-discoverable (as being privileged) in a separate action involving one of the

parties and the non-party was determined to be a sufficient reason to keep the file sealed. 616 F.2d at 461-462. The same results would occur in the present situation and should be a sufficient basis for this Court to maintain its file for this case sealed. See also, *Nixon*, 435 U.S. 589, 598, L. ed. 2d 570, 580 98 S. Ct. 1306 (1978).

VI.

THE INTERVENORS' ASSERTION OF JUDICIAL ECONOMY AND COST EFFECTIVENESS BY THE GRANTING OF THEIR REQUEST IS UNTRUE.

As stated above, the Intervenor are requesting the modification of the protective orders in order to permit a review of documents produced in the UNC litigation with the stated justification that in so doing, they, and the courts, would avoid the cost and time required by similar requests and productions in each of their respective cases. The fallacy of this assertion is that this Court would need to supervise the production of the requested documents in order to determine the relevancy of the documents which they are requesting to review.

A party cannot get around the relevancy requirement for discoverable materials simply by intervening in an unrelated case and filing an FRCP Rule 34 request upon a party. The questions of relevance in terms of the issues in each of the other four cases and privilege still must be decided by a court. However, instead of these questions being determined by judges who are familiar with the facts in each case, the Intervenor are implicitly requesting that this Court "grasp the nettle" and decide the divergent discovery issues in each of the four cases, including those issues already decided by the courts in those actions. The "judicial efficiency" and "cost effectiveness" to be gained by placing this burden upon this Court is beyond the EIL Insurers' comprehension.

The EIL Insurers assert that the Intervenor's blanket request for all pleadings filed by the EIL Insurers during the course of this case as well as all documents produced by the EIL Insurers and all deposition transcripts relating to EIL insurance goes far beyond any party's right to liberal discovery as permitted under the Federal Rules of Civil Procedure. The Intervenor has not made any representation as to the relevance of these documents in their respective cases. This Court should be hesitant to grant this type of request when it is highly unlikely that any court, including the judges in each of the Intervenor's individual coverage actions, would sustain such a wholesale request.

VII.

CONCLUSION

Cranford, Sphere and International respectfully request that this Court deny the Intervenor's Motion to Intervene due to the untimeliness of their request and deny their Motion to Modify Protective Order because the Intervenor lacks standing and has failed to demonstrate the existence of a compelling need or extraordinary circumstances warranting the requested modification.

Respectfully Submitted,

BUTT, THORNTON AND BAEHR,
P.C.

/s/

for John A. Klecan

Attorneys for Defendants,

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Albuquerque, New Mexico 87190

Telephone: [505] 884-0777

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record on June 9, 1989.

/s/
for John A. Klecan

SUPREME COURT OF THE UNITED STATES

NO. A-186

**CRANFORD INSURANCE COMPANY, *et al.*,
*Petitioners***

v.

ROHM & HAAS COMPANY, *et. al.*

ORDER

UPON CONSIDERATION of the application of counsel
for the petitioners,

IT IS ORDERED that the time for filing a petition for a
writ of certiorari in the above-entitled case, be and the same
is hereby, extended to and including October 13, 1990.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court
of the United States

Dated this 10th day of September, 1990.



DEC 19 1990

JOSEPH P. SPANIOL, JR.
CLERK

2
No. 90-631

IN THE
Supreme Court of the United States

October Term, 1990

CRANFORD INSURANCE COMPANY, now known as
AMERICAN SPECIAL RISK INSURANCE COMPANY, a
Delaware Corporation; SPHERE INSURANCE COMPANY, LTD.;
now known as SPHERE DRAKE INSURANCE, PLC, a British
Corporation; INTERNATIONAL INSURANCE COMPANY, an
Illinois Corporation,

Petitioners,

v.

ROHM & HAAS COMPANY; SOUTH MACOMB DISPOSAL
AUTHORITY; WASTE MANAGEMENT, INC.; CHEMICAL
WASTE MANAGEMENT, INC.; GENERATORS OF WASTE AT
THE ENVIRONMENTAL CONSERVATION AND CHEMICAL
CORPORATION SITE, in Zionsville, Indiana,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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December 19, 1990

QUESTIONS PRESENTED

1. Whether certiorari should be denied because a purported conflict among the Circuit Courts of Appeal does not exist.

2. Whether certiorari should be denied because Fed. R. Civ. P. 24(b) does not require a permissive intervenor seeking to modify a protective order in a settled and dismissed action to assert an independent basis of federal jurisdiction or file a pleading asserting a claim or defense.

LIST OF PARTIES

Parties

Respondents adopt the identification of parties set forth in the Petition at page ii.

Corporate Disclosure

The corporate affiliation disclosure required by Supreme Court Rule 29.1 for each of the Respondents is listed in the Appendix to this Brief at pages Ra1-Ra20.

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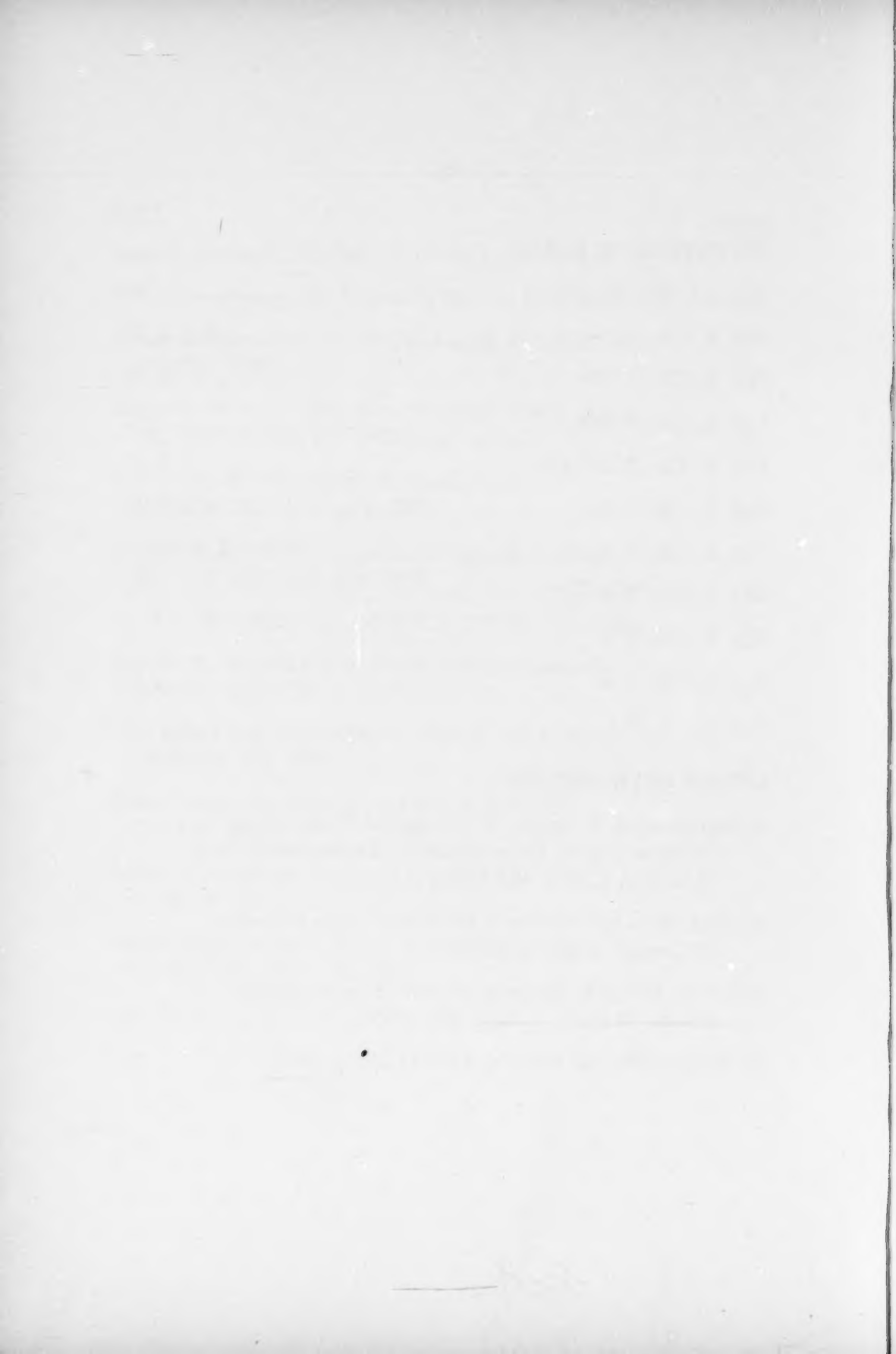
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No. 90-631

IN THE
Supreme Court of the United States
October Term, 1990

CRANFORD INSURANCE COMPANY, now known as
AMERICAN SPECIAL RISK INSURANCE COMPANY, a
Delaware Corporation; SPHERE INSURANCE COMPANY,
LTD.; now known as SPHERE DRAKE INSURANCE, PLC, a
British Corporation; INTERNATIONAL INSURANCE COM-
PANY, an Illinois Corporation,

Petitioners,

v.

ROHM & HAAS COMPANY; SOUTH MACOMB DISPOSAL
AUTHORITY; WASTE MANAGEMENT, INC.; CHEMICAL
WASTE MANAGEMENT, INC.; GENERATORS OF WASTE
AT THE ENVIRONMENTAL CONSERVATION AND
CHEMICAL CORPORATION SITE, in Zionsville, Indiana,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

Respondents, Rohm & Haas Company, South Macomb Dis-
posal Authority, Waste Management, Inc., Chemical Waste Man-
agement, Inc., and Generators of Waste at the Environmental
Conservation and Chemical Corporation Site, in Zionsville, In-
diana, respectfully request that this Court deny the Petition for a
Writ of Certiorari which seeks review of the opinion of the Tenth
Circuit Court of Appeals reported at 905 F.2d 1424 (10th Cir.
1990).

STATEMENT OF THE CASE

In May 1985, United Nuclear Corporation ("UNC") filed a declaratory judgment action in New Mexico state court seeking coverage for environmental claims under Environmental Impairment Liability ("EIL") policies issued by Petitioners Cranford Insurance Company (n/k/a American Special Risk Insurance Company), Sphere Insurance Company, Ltd. (n/k/a Sphere Drake Insurance, PLC.) and International Insurance Company (the "UNC action"). In June 1985, Petitioners removed this action to the United States District Court for the District of New Mexico.

In December 1985, UNC filed a Request for Production of Documents. In February 1986, the parties stipulated to the entry of a protective order (the "Protective Order"), Pet. App. 22a-25a, and Petitioners produced the requested documents.¹ Shortly thereafter, in June 1986, the parties entered into a settlement agreement. In August 1986, on Petitioners' Motion, the District Court dismissed the UNC action and ordered the court record and files sealed until further order of the court. Pet. App. 17a.

Each Respondent is a party in a separate declaratory judgment action seeking coverage for environmental claims under EIL policies issued by one or more of the Petitioners. On May 2, 1989, Respondents moved to intervene in the UNC action pursuant to Fed. R. Civ. P. 24(b) to modify the definition of "authorized persons" set forth in the Protective Order so that they could gain access to relevant discovery materials for use in those collateral lawsuits. Included in Respondents' motion papers was a Request for Production of Documents pursuant to Fed. R. Civ. P. 34.

On August 14, 1989, the District Court granted Respondents' motion for intervention. The District Court found that the inter-

¹ In May 1986, the parties stipulated to the entry of an amended protective order. Pet. App. 26a-28a. The amended order varied from the original order only to the extent that it provided for a limited waiver as to certain attorney-client communications and attorney work product that had been inadvertently produced by Petitioners.

pretation of EIL policies issued by or through Petitioners is common to Respondents' pending litigation across the country and that "Rule 24 intervention is the procedurally correct course" for obtaining discovery from the UNC action. Pet. App. 12a. The District Court concluded that "[a]llowing the movants access to the relevant information will avoid time consuming and costly duplication of discovery in accordance with the mandate of Fed. R. Civ. P. 1 to 'secure the just, speedy and inexpensive determination of every action.' " Pet. App. 12a. In allowing Respondents access to this information, the District Court ordered that "[a]ll intervening parties shall use the information obtained solely for the purpose of litigating their current lawsuits and shall be otherwise fully bound by the terms of the existing protective order." Pet. App. 13a.

The District Court denied Petitioners' motion to stay its Order pending appeal to the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals likewise denied Petitioners' Emergency Application for a Stay of the District Court's Order pending appeal. Pet. App. 14a. Thereafter, the requested material was produced to Respondents.

On June 15, 1990, the Tenth Circuit Court of Appeals affirmed the District Court's decision. Pet. App. 1a-8a. This Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals followed.

REASONS FOR DENYING THE WRIT

In considering whether to grant certiorari to resolve a conflict between the Circuit Courts of Appeal, this Court focuses on the significance of the issue in conflict. See *Segal v. Rochelle*, 382 U.S. 375, 378 (1966). As stated in *Magenau v. Aetna Freight Lines*, 360 U.S. 273 (1959):

[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the

public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Id. at 284-85 (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). See generally S. Estreicher & J. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 722-28 (1984).

The issues Petitioners seek to bring before this Court cannot pass this test. First, the dispute in this action involves a straightforward discovery question in which the trial court is called upon to exercise its broad discretion in construing and enforcing the Federal Rules of Civil Procedure. In addition, despite their protestations to the contrary, Petitioners must overcome (1) the acknowledged mootness of this dispute,² (2) the absence of a split among the Circuit Courts of Appeal as to the legal issues raised, and (3) the total lack of legal, factual or even logical support for their interpretation of Fed. R. Civ. P. 24 under the circumstances here present.

As for the alleged conflict among the Circuit Courts of Appeal regarding the standard for modifying a protective order, Respondents submit no such conflict exists. Rather, the Circuit Courts each upheld the same legal principle, *i.e.*, the requirement of Fed. R. Civ. P. 26(c) that "good cause" be shown in order for a protective order to issue initially or to remain in force thereafter. In fulfilling that mandate, the Circuit Courts have acknowledged

² The questions presented are moot because the documents have been produced to and used by the Respondents in the collateral litigation for which they were obtained. Petitioners will not be prejudiced by this disclosure because, as noted previously, Respondents are limited in their use of the information by the terms of the Protective Order. Because the resolution of this type of discovery dispute is fact dependent and subject to the trial court's discretion in each case, the "capable of repetition yet evading review" exception permitting review of moot questions does not justify review in this case. See *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 n.5 (1974).

the district court's broad discretion in eliciting and then balancing the respective interests of the parties to the discovery dispute and resolving such matters on a case-by-case basis. The purported conflict urged by Petitioners is not a conflict between opinions or authorities, but rather only a difference in the outcomes reached by particular courts based on the specific and varying facts before them. With regard to the need to balance the interests in disclosure and protection of documents after disclosure and to uphold the standards set forth in Fed. R. Civ. P. 1 and 26(c), the Circuit Courts are in complete agreement.

Finally, Petitioners' argument that Fed. R. Civ. P. 24(b)(2) was unavailable to Respondents in the absence of complete diversity and a filed pleading hardly warrants a serious reply. It suffices to say that all the cases addressing non-party access to protected discovery materials acknowledge that the appropriate method to seek that relief is by way of a motion for permissive intervention and no federal case explicitly or implicitly requires the permissive intervenor in that context to establish an independent basis for federal jurisdiction or to file a pleading.

Under the circumstances, therefore, there is no cause for this Court to exercise its certiorari jurisdiction and the Petition should be denied.

ARGUMENT

I.

Certiorari Should Be Denied Because A Purported Conflict Among The Circuit Courts Of Appeal Does Not Exist

Whether to lift or modify a protective order is a decision committed to the sound discretion of the trial court, subject to review only for an abuse of that discretion. *See, e.g., In re "Agent Orange" Product Liability Lit.*, 821 F.2d 139, 147 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987); *Meyer Goldberg, Inc. of Lorain v. Fisher*

Foods, Inc., 823 F.2d 159, 161-63 (6th Cir. 1987). In the face of such broad discretion, which counsels against this Court's review of this matter, Petitioners invoke the specter of a "true and direct" conflict of opinion among the Circuit Courts of Appeal concerning the standard by which such discovery disputes should be decided.

According to Petitioners, the Tenth Circuit here adopted an approach previously adopted by the Seventh and Ninth Circuits, see *Wilk v. American Medical Ass'n*, 635 F.2d 1295 (7th Cir. 1981) and *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir.), cert. denied, 379 U.S. 900 (1964),³ which, in Petitioners' view, frustrates the intended purpose of Fed. R. Civ. P. 26(c) by placing the "burden of persuasion" in the face of a request for modification of a protective order on the party opposing such modification.⁴ By contrast, Petitioners read *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979) and *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), cert. denied sub nom., *Iowa Beef Processors, Inc. v. Smith*, 441 U.S. 907 (1979), as appropriately placing the "burden of persuasion" on the party seeking modification.

A review of these cases does not disclose the alleged conflict which Petitioners' argument manufactures. Rather, consistent with the "good cause" analysis required to maintain any protective order pursuant to Fed. R. Civ. P. 26(c), each of these cases is fact sensitive and turns upon an informed application of appropriate discretion in conducting that analysis. Accordingly, the exercise of this Court's certiorari jurisdiction would be

³ *Accord Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988), cert. denied, 488 U.S. 1030 (1989); *Superior Oil Co. v. American Petrofina Co. of Texas*, 785 F.2d 130 (5th Cir. 1986) (per curiam).

⁴ Petitioners' additional argument that the Tenth Circuit's decision has the effect of frustrating settlements is unpersuasive for the simple reason that in most settlements (and most protective orders) the parties obtain the return of their respective documents after the case is settled. Thus, as a general matter, there will be no issue with respect to the continuation of a protective order.

inappropriate where such wide discretion is afforded the district courts.

Rule 26(c) mandates that protective orders can be issued only for "good cause" shown. As noted by the Second Circuit,

A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection. . . . Any other conclusion effectively would negate the good cause requirement of Rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.

In re "Agent Orange" Product Liability Lit., *supra*, 821 F.2d at 145-46. The "good cause" requirement furthers the time-honored tradition that civil discovery take place in the public eye. *See, e.g., American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 971 (1979). *Accord Olympic Refining Co. v. Carter*, *supra*, 332 F.2d at 264. *See generally Nonparty Access To Discovery Materials In The Federal Courts*, 94 Harv. L. Rev. 1085, 1085-86 (1981).

In debating the propriety of modifying the Protective Order here, both sides to this dispute claim to advance the goal required by Fed. R. Civ. P. 1 in construing the Federal Rules of Civil Procedure: "the just, speedy, and inexpensive determination of every action." However, although a protective order may serve these interests initially—to the extent it avoids motion practice and encourages timely and responsive disclosure—it also frustrates that goal with regard to collateral litigation. To ensure that protective

orders both serve their intended purposes and restrict discovery as little as possible, federal courts faced with requests to modify existing protective orders revisit the "good cause" requirement of Rule 26(c) to make the same ultimate determination of whether continued protection of discovery materials is warranted.

The Seventh Circuit's application of the "good cause" analysis can best be seen in *Wilk v. American Medical Ass'n*, *supra*:

This presumption [of open discovery] should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process. . . . We therefore agree with the result reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.

Id. at 1299 (citations omitted). To protect the party opposing modification, however, the Seventh Circuit concluded that "[o]nce such prejudice is demonstrated . . . the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order." *Id.* Consistent with the Rule 26(c) requirement that "good cause" be shown by the party seeking the protective order in the first place, the Seventh Circuit test focuses on "good cause" for continued protection (*i.e.*, tangible prejudice to substantial rights) of the party resisting additional disclosure.

Virtually every federal case to consider this issue—including the Tenth Circuit in this case—has employed this standard, re-

quiring proof of continued “good cause” for protection and exercising discretion in judging the strength of the required showing and balancing disclosure and protection interests. For example, the Tenth Circuit here, cognizant of the dueling efficiency considerations cited by both sides, satisfied itself that “any legitimate interest the [Petitioners] have in continued secrecy as against the public at large can be accommodated by placing [Respondents] under the restrictions on use and disclosure contained in the original order,” 905 F.2d at 1428, which is precisely what the District Court had done in modifying the Protective Order.

The Second and Eighth Circuits did not adopt a different standard of analysis. Rather, they too balanced continued “good cause” for protection against the interests served by disclosure prior to authorizing additional disclosure. However, unlike the instant case and the cases relied on by the Tenth Circuit, the decisions from the Second and Eighth Circuits cited by Petitioners did not involve the modification of a protective order at the request of a private litigant seeking discovery for its own case involving common issues of fact or law.

Martindell v. International Tel. & Tel. Corp., *supra*, 594 F.2d 291, involved a stockholders’ derivative action against ITT and certain of its officers and directors stemming from alleged expenditures to influence the 1970 Chilean elections. *Id.* at 292-93. Discovery was conducted pursuant to a court-approved stipulation that discovery fruits would be used only in that litigation. *Id.* at 293. As the civil case was being settled, the federal government requested the deposition transcripts of twelve witnesses in connection with an investigation of possible crimes related to the subject matter of the civil suit. *Id.* The trial court denied the government access to the deposition transcripts “out of solicitude for the witnesses’ Fifth Amendment rights,” *id.* at 295, and the Second Circuit affirmed, stating that the trial court “did not abuse [its] discretion in refusing to vacate or modify [the] order.” *Id.* at 297.

The crux of the Second Circuit's rationale was simply stated: "In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders." *Id.* at 295-96. The Court further reasoned that the federal government has "awesome powers" which render unnecessary its exploitation of the fruits of private litigation." *Id.* at 296, quoting *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976). Accordingly, the Court concluded that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need," the order should not be modified. *Id.* at 296. On balance, "good cause" for a continued protective order outweighed the interests served by disclosure. Because "good cause" existed in the first place, the Court placed the burden on the government to show that "good cause" never existed, no longer existed or was outweighed by superior interests. *See also Palmieri v. State of New York*, 779 F.2d 861, 866 (2d Cir. 1985) (same analysis as *Martindell* where State sought access to protected materials); *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982).⁵

Iowa Beef Processors, Inc. v. Bagley, *supra*, 601 F.2d 949, involved a suit for misappropriation of confidential information by former employees of Iowa Beef Processors ("IBP"), including defendant Bagley. A congressional subcommittee investigating pricing practices in the meat industry sought to obtain documents from Bagley, a former officer of IBP, which was the target of numerous private antitrust suits. *Id.* at 951. Thus, not only were the documents covered by a protective order, but the documents themselves were "an important part of the subject matter of the underlying lawsuit," *id.* at 954, as IBP claimed that Bagley had tak-

⁵ However, in a subsequent case where the entity seeking access to protected materials was not the federal government, the Second Circuit questioned (without deciding) the application of the *Martindell* standard. *In re "Agent Orange" Product Liability Lit.*, *supra*, 821 F.2d at 147.

en the documents without authorization when he left IBP's employ.

Bagley, an original party to the protective order, sought relief from its terms to give materials to the subcommittee. The district court modified the protective order and released the documents "without any showing that intervening circumstances had in any way obviated the potential prejudice to IBP" and "without any constraints on the Subcommittee's use thereof," which the Eighth Circuit believed "could well render moot in part IBP's claims for relief in the underlying lawsuit." *Id.* Under those circumstances, the Eighth Circuit found the district court had abused its discretion in modifying the protective order as it did.

Because of unique factual circumstances in *Martindell* and *Iowa Beef*, the Courts found "good cause" to leave the protective orders at issue undisturbed. The identity of the entity seeking disclosure of protected discovery, the relationship between the discovery requested and the merits of the underlying lawsuit, and the district court's inability or failure to sufficiently protect the interests of the parties opposing modification of the protective order, justified the Second and Eighth Circuit's conclusions that "good cause" existed for refusing to modify the protective orders as requested. Given the same set of facts, the Seventh Circuit likely would have reached the same conclusion. *See Wilk v. American Medical Ass'n, supra*, 635 F.2d at 1300 (distinguishing Second Circuit cases because of government involvement and resulting "unique danger of oppression"). *See generally* 94 Harv. L. Rev. at 1091-95.

Petitioners do this Court a disservice in characterizing the Circuit Court decisions as being in conflict because they "shift the burden of persuasion." In debating the continuing validity of a protective order, each party has the burden of persuading the court to exercise its discretion in favor of that party's position in the face of a given set of facts. The common approach of the Circuit Courts requires the parties to set forth their respective needs

for information and protection, and requires the district court to balance these interests and exercise discretion to protect both sides' interests in structuring any modification. Whether "good cause" is presumed and the non-party has the burden to rebut the presumption, or whether the party fighting disclosure has to establish continued "good cause" to maintain the protective order, the ultimate interests weighed and the standard to be met will be the same: the "good cause" for protection required by Rule 26(c).⁶ Thus, whatever fact-specific, initial presumption is drawn by a particular court in a particular case has no significance in this case and does not warrant this Court's intervention.

What is significant in the cited cases is the question of what does and does not constitute the "good cause" necessary to maintain a protective order. For example, "good cause" includes the protection of trade secrets and similar information.⁷ Fed. R. Civ. P. 26(c)(7). On the other hand, the primary purpose motivating Petitioners here—preventing publication of presumably damaging information for use in collateral litigation—has been repeatedly declared to be an improper motivation for restricting access to discovery. Indeed, in a factually-similar case involving insurers seeking a protective order in an insured's action for coverage for

⁶ This reconsideration of "good cause" is especially important because the "good cause" showing required by Rule 26(c) has been largely obviated by the increasingly common use of blanket protective orders entered by stipulation of the parties with court approval, often without any "good cause" analysis. See generally *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 267-68 (M.D.N.C. 1988), *aff'd*, 878 F.2d 801 (1989); 94 Harv. L. Rev. at 1089-90. In fact, the Second Circuit has expressed its disfavor of this practice, noting that such "improvidence in the granting of a protective order is yet another justification for lifting or modifying" a protective order. *In re "Agent Orange" Product Liability Lit.*, *supra*, 821 F.2d at 148. The Protective Order here is such a stipulated order—reciting simply that the disclosed materials will be treated as "confidential"—and was never subjected to a thorough Rule 26(c) examination.

⁷ This concern is not germane to this case, however, as Petitioners have never claimed that the protected documents contained "confidential" information within the meaning of Rule 26(c)(7).

environmental harm, one district court dismissed such a rationale directly and succinctly:

[I]f the basis for defendants' motion is to prevent information from being disseminated to other potential litigants, then defendants' application must fail. With increasing frequency, defendants, as well as other insurers, are finding themselves embroiled in litigation over whether there is coverage for property damage as a result of environmental harm. The courts have emphatically held that a protective order cannot be issued simply because it may be detrimental to the movant in other lawsuits. . . . Using fruits of discovery from one lawsuit in another litigation, and even in collaboration among various plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure.

Nestle Foods Corp. v. Aetna Casualty and Surety Co., 129 F.R.D. 483, 486 (D.N.J. 1990) (footnote and citations omitted).

The concept of "shared discovery" has been endorsed repeatedly by the majority of federal courts because it responds to the mandate of Fed. R. Civ. P. 1. See *Ex parte Upperco*, 239 U.S. 435, 440 (1915). As stated by one district court:

By requiring each plaintiff in every similar action to run the same gauntlet over and over again serves no useful purpose other than to create barriers and discourage litigation against the defendants. Good cause as contemplated under Rule 26 was never intended to make other litigation more difficult, costly and less efficient.

Cippollone v. Liggett Group, Inc., 113 F.R.D. 86, 87 (D.N.J. 1986), *aff'd*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).⁸ In

⁸ *Accord Wyeth Laboratories v. United States District Court*, 851 F.2d 321, 323-24 (10th Cir. 1988); *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir.

Footnote continued on next page.

fact, one commentator (whose thesis otherwise favors strengthening protective orders) emphasized that

the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation. The issue generally arises when a nonparty asks the court that entered a protective order to modify the order to permit disclosure to him. Under these circumstances, modification furthers, rather than undermines, the policies underlying rule 1.

Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 41 (1983) (footnote omitted).

In sum, Rule 26(c) requires every court considering whether to modify a protective order to ascertain whether "good cause" exists to maintain it and to weigh that "good cause" against the interests and needs of the entity seeking disclosure of the protected information. The trial judge has wide discretion in making that inquiry and eliciting and balancing the relevant interests, so long as the goal of the inquiry is to satisfy the Rule 26(c) "good cause" standard for the maintenance of protective orders. Inasmuch as all the Circuit Courts addressing the issue have explicitly or implicitly acknowledged that goal, there is no "real and embarrassing conflict of opinion and authority" among the Circuits which would warrant the exercise of this Court's certiorari jurisdiction.

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1985); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, *supra*, 121 F.R.D. at 268-69; *Deford v. Schmid Products Co.*, 120 F.R.D. 648, 654 (D. Md. 1987); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Col. 1982) ("[e]fficient administration of justice requires that courts encourage, not hamstring, information exchanges such as that here involved"); *U.S. v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981).

II.

Certiorari Should Be Denied Because Fed. R. Civ. P. 24 Does Not Require A Permissive Intervenor Seeking To Modify A Protective Order In A Settled And Dismissed Action To Assert An Independent Basis Of Federal Jurisdiction Or File A Pleading Asserting A Claim Or Defense.

Permissive intervention is a matter within the sound discretion of the district court, to be disturbed on review only upon a showing of clear abuse of that discretion. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Petitioners allege such an abuse of discretion in the District Court's granting of Respondents' motion for permissive intervention absent an independent jurisdictional basis⁹ and in the absence of the pleading said to be required by Fed. R. Civ. P. 24(c). Both arguments are specious and provide no basis for this Court to grant the Petition.

Petitioners assert that allowing Respondents to intervene in this action absent an independent basis of federal jurisdiction conflicted with this Court's decisions in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978) and *Finley v. United States*, 490 U.S. 545 (1989).¹⁰ No such conflict exists, however, as those

* Petitioners note that the Tenth Circuit did not address this argument, but neglect to mention that the argument was never raised in either court below. The argument is as follows. Jurisdiction in the UNC action was based on diversity of citizenship. One of the four Respondents and one of the Petitioners have their principal places of business in Illinois, thereby destroying diversity jurisdiction as between them. According to Petitioners, Respondents did not and cannot allege any other basis of federal jurisdiction which would permit them to participate in the action.

¹⁰ Petitioners' reliance on Justice O'Connor's separate opinion in *Diamond v. Charles*, 476 U.S. 54 (1986), is misplaced. That case dealt with a private physician's attempt to intervene and defend the validity of a state abortion statute, not a non-party seeking intervention in order to gain access to pretrial discovery materials for use in a collateral action. Even there, however, Justice O'Connor

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cases dealt with the unavailability of pendent party jurisdiction over defendants for whom an independent jurisdictional basis was lacking where plaintiffs sought to bring **affirmative claims** against them arising from the same action. Neither *Kroger* nor *Finley* addresses the context of a permissive intervenor making a limited discovery request but not seeking to assert a claim or defense in the action.

The same is true of the alleged conflict in Circuit Court cases addressing this issue: in each case relied on by Petitioners, an intervenor sought to become involved in the merits of the underlying litigation, as opposed to seeking access to discovery. As aptly noted by the Tenth Circuit herein, “[t]he most important circumstance in this case is that intervention was not on the merits, but for the sole purpose of challenging a protective order.” 905 F.2d at 1427. None of the cases arising in the context of intervention for discovery purposes only even mentions the jurisdictional issue raised by Petitioners here.

Moreover, Respondents’ participation in the action for the limited purpose of discovery had no bearing on the District Court’s diversity jurisdiction. Federal diversity jurisdiction pursuant to 28 U.S.C. §1332(a)(1) contemplates diverse citizenry between the **real parties** to an action. See *Navarro Savings Ass’n v. Lee*, 446 U.S. 458, 460-61 (1980). In addition, once a federal court properly has jurisdiction over an action based on diversity, that jurisdiction is not “defeated by the intervention . . . of a party whose presence is not essential to a decision of the controversy between the original parties.” *Wichita R. & Light Co. v. Public Utilities Comm’n*, 260 U.S. 48, 54 (1922). Logic and caselaw dictate, therefore, that the intervention of an entity for the limited purpose

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acknowledged that “permissive intervention ‘plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation’” *Id.* at 77 (citation omitted).

of obtaining access to discovery has no impact on the established diversity jurisdiction of a federal district court.¹¹

In this case, the District Court correctly determined that permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2) is the proper method by which a non-party may seek modification of a protective order. The Tenth Circuit's affirmance of that decision accords with decisions of the Circuit Courts that have addressed the issue. *See, e.g., Public Citizen v. Liggett Group, Inc., supra*, 858 F.2d at 783; *Martindell v. International Tel. & Tel. Corp., supra*, 594 F.2d at 294; *In re Beef Industry Antitrust Lit.*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., supra*, 823 F.2d at 162. The District Court's finding that the interpretation of EIL policies issued by Petitioners was common to Respondents' pending actions provided a sufficient basis for intervention and was properly endorsed by the Tenth Circuit. Therefore, the District Court was well within its discretion in granting permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2), even assuming the absence of an independent basis of federal jurisdiction.

Petitioners' peculiar argument that Respondents were required to file a Rule 24(c) pleading is not only unsupported by any caselaw, but as a practical matter defies logic and serves no juris-

¹¹ Moreover, contrary to Petitioners' assertion, the granting of permissive intervention in the absence of independent jurisdictional grounds does not enlarge federal jurisdiction in violation of Fed. R. Civ. P. 82. As the Second Circuit noted in *Lesnik v. Public Industrial Corp.*, 144 F.2d 968 (2d Cir. 1944):

[J]urisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. . . . Obviously a mere broadening of the content of a single federal action must not be confused with the extension of federal power; otherwise, such recognized steps as the union of law and equity or the free joinder of counter-claims would be dragged into the ambit of jurisdictional prohibitions, while actually they compress and desirably reduce the bulk and amount of federal litigation.

Id. at 973 (citation omitted).

prudential purpose.¹² The purpose of requiring an intervenor to file a pleading is to enable the court to determine whether permissive intervention should be granted, *Miami County Nat. Bank of Paola, Kan. v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941), and to place the other parties on notice of the position, claim and relief sought by the intervenor. *Spring Construction Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980); *WJA Realty Ltd. Partnership v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Fla. 1989). Respondents' motion papers, which included a Rule 34 Request for Production of Documents, clearly and specifically indicated not only the factual basis for the motion to intervene and Respondents' position and interest in the action, but also the limited scope of the requested relief, thus satisfying the purpose of the Fed. R. Civ. P. 24(c) pleading provision.

Furthermore, judicial interpretation of the pleading requirement has been liberal and courts have held that the proper approach to the rule is to disregard non-prejudicial defects. *Spring Construction Co., Inc. v. Harris*, *supra*, 614 F.2d at 377; *WJA Realty Ltd. Partnership v. Nelson*, *supra*, 708 F. Supp. at 1272. See generally 3B Moore's *Federal Practice*, §24.14 (2d ed. 1990). Even the cases upon which Petitioners rely indicate that the pleading requirement of Fed. R. Civ. P. 24(c) may be satisfied by something less than a pleading. See *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 548 & n.9 (1986); *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987); *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 761 (2d Cir. 1968); *Arvidu Corp. v. City of Boca Raton*, 59 F.R.D. 316, 323 (S.D. Fla. 1973).

On the other hand, the cases that do involve intervention for discovery purposes either require less than rigid adherence to the Rule 24(c) pleading requirement or dispense with it as a mere technicality that has no meaning in this context. See, e.g., *Public*

¹² Petitioners correctly note that Fed. R. Civ. P. 24(c) provides that a party seeking intervention shall file a motion "accompanied by a pleading setting forth the claim or defense for which intervention is sought."

Citizen v. Liggett Group, Inc., *supra*, 858 F.2d at 784; *Martindell v. International Tel. & Tel. Corp.*, *supra*, 594 F.2d at 293; *In re Beef Industry Antitrust Lit.*, *supra*, 589 F.2d at 789. Thus, in the absence of any conflict among the Circuit Courts or disservice to the purposes of Rule 24(c), this Court should deny the Petition to the extent it seeks clarification of Fed. R. Civ. P. 24.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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December 19, 1990

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Enviro-Chem Generators



APPENDIX



**RESPONDENT ROHM & HAAS COMPANY
SUBSIDIARIES AND AFFILIATES**

Plaskon Electronic Materials, Inc.	Plaskon Electronic Materials, Inc., subsidiary of Rohm & Haas Company
Polytribo, Inc.	Polytribo, Inc., subsidiary of Rohm & Haas Company
Rohm and Haas Bayport, Inc.	Rohm and Haas Bayport, Inc., subsidiary of Rohm & Haas Company
Rohm and Haas California Incorporated	Rohm and Haas California Incorporated, subsidiary of Rohm & Haas Company
Rohm and Haas Capital Corporation	Rohm and Haas Capital Corporation, subsidiary of Rohm & Haas Company
Rohm and Haas Connecticut Incorporated	Rohm and Haas Connecticut Incorporated, subsidiary of Rohm & Haas Company
Rohm and Haas Credit Corporation	Rohm and Haas Credit Corporation, subsidiary of Rohm & Haas Company
Rohm and Haas Delaware Inc.	Rohm and Haas Delaware Inc., subsidiary of Rohm & Haas Company
Rohm and Haas Delaware Valley Inc.	Rohm and Haas Delaware Valley Inc. subsidiary of Rohm & Haas Company
Rohm and Haas Equity Corporation	Rohm and Haas Equity Corporation, subsidiary of Rohm & Haas Company
Rohm and Haas Finance Company	Rohm and Haas Finance Company, subsidiary of Rohm & Haas Company

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Rohm and Haas Illinois Inc.	Rohm and Haas Illinois Inc., subsidiary of Rohm & Haas Company
Rohm and Haas Kentucky Incorporated	Rohm and Haas Kentucky Incorporated, subsidiary of Rohm & Haas Company
Rohm and Haas Latin America, Inc.	Rohm and Haas Latin America, Inc., subsidiary of Rohm & Haas Company
Rohm and Haas Science Inc.	Rohm and Haas Science Inc., subsidiary of Rohm & Haas Company
Rohm and Haas Southern California Inc.	Rohm and Haas Southern California Inc., subsidiary of Rohm & Haas Company
Rohm and Haas Technology Holdings, Inc.	Rohm and Haas Technology Holdings, Inc., subsidiary of Rohm & Haas Company
Rohm and Haas Tennessee Incorporated	Rohm and Haas Tennessee Incorporated, subsidiary of Rohm & Haas Company
Rohm and Haas Texas Incorporated	Rohm and Haas Texas Incorporated, subsidiary of Rohm & Haas Company
Romicon, Inc.	Romicon, Inc., subsidiary of Rohm & Haas Company
The Southern Resin and Chemical Company	The Southern Resin and Chemical Company, subsidiary of Rohm & Haas Company
Supelco, Inc.	Supelco, Inc., subsidiary of Rohm & Haas Company

**Laboratorios Quimicos
Industriales, S.A.**

**Maquiladora General
de Matamoros, S.A. de C.V.**

**Plaskon Electronic
Materials, Ltd.**

**Rohm and Haas
Australia Pty. Ltd.**

**Rohm and Haas
(Bermuda), Ltd.**

Rohm and Haas Brasil Ltda.

Rohm and Haas Canada Inc.

**Rohm and Haas
Centro America S.A.**

**Rohm and Haas
Colombia S.A.**

**Rohm and Haas
Deutschland GmbH**

Rohm and Haas Espana S.A.

**Laboratorios Quimicos
Industriales, S.A., subsidiary
of Rohm & Haas Company**

**Maquiladora General de
Matamoros, S.A. de C.V.,
subsidiary of Rohm & Haas
Company**

**Plaskon Electronic Materials,
Ltd., subsidiary of Rohm &
Haas Company**

**Rohm and Haas Australia
Pty. Ltd., subsidiary of
Rohm & Haas Company**

**Rohm and Haas (Bermuda),
Ltd., subsidiary of Rohm &
Haas Company**

**Rohm and Haas Brasil Ltda.
a subsidiary of Rohm &
Haas Company**

**Rohm and Haas Canada
Inc., subsidiary of Rohm &
Haas Company**

**Rohm and Haas Centro
America S.A., subsidiary of
Rohm & Haas Company**

**Rohm and Haas Colombia
S.A., subsidiary of Rohm &
Haas Company**

**Rohm and Haas Deutschland
GmbH, subsidiary of Rohm
& Haas Company**

**Rohm and Haas Espana
S.A., subsidiary of Rohm &
Haas Company**

Ra 4

Rohm and Haas Foreign Sales Corporation	Rohm and Haas Foreign Sales Corporation, subsidiary of Rohm & Haas Company
Rohm and Haas France S.A.	Rohm and Haas France S.A., subsidiary of Rohm & Haas Company
Rohm and Haas Holdings, Ltd.	Rohm and Haas Holdings, Ltd., subsidiary of Rohm & Haas Company
Rohm and Haas Italia S.r.l.	Rohm and Haas Italia S.r.l., subsidiary of Rohm & Haas Company
Rohm and Haas Japan K.K.	Rohm and Haas Japan K.K., subsidiary of Rohm & Haas Company
Rohm and Haas Mexico S.A. de C.V.	Rohm and Haas Mexico S.A. de C.V., subsidiary of Rohm & Haas Company
Rohm and Haas New Zealand Limited	Rohm and Haas New Zealand Limited, subsidiary of Rohm & Haas Company
Rohm and Haas Nordiska AB	Rohm and Haas Nordiska AB, subsidiary of Rohm & Haas Company
Rohm and Haas Philippines, Inc.	Rohm and Haas Philippines, Inc., subsidiary of Rohm & Haas Company
Rohm and Haas Scotland	Rohm and Haas Scotland, subsidiary of Rohm & Haas Company
Rohm and Haas (UK) Limited	Rohm and Haas (UK) Limited, subsidiary of Rohm & Haas Company

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Romicon, B.V.	Romicon, B.V., subsidiary of Rohm & Haas Company
Akriil	Akriil, affiliate of Rohm & Haas Company
Eastern Rohm and Haas Development Center	Eastern Rohm and Haas Development Center, affiliate of Rohm & Haas Company
Japan Acrylic Chemical Co., Ltd.	Japan Acrylic Chemical Co., Ltd., affiliate of Rohm & Haas Company
Modipon Limited	Modipon Limited, affiliate of Rohm & Haas Company
NorsoHaas, S.A.	NorsoHaas, S.A., affiliate of Rohm & Haas Company
Quimica Trepic, S.A. de C.V.	Quimica Trepic, S.A. de C.V., affiliate of Rohm & Haas Company
Shipley Company	Shipley Company, affiliate of Rohm & Haas Company
SumikaHaas	SumikaHaas, affiliate of Rohm & Haas Company
Tokyo Organic Chemical Industries, Ltd.	Tokyo Organic Chemical Industries, Ltd., affiliate of Rohm & Haas Company
TosoHaas	TosoHaas, affiliate of Rohm & Haas Company
Yugocryl	Yugocryl, affiliate of Rohm & Haas Company

RESPONDENT SOUTH MACOMB DISPOSAL AUTHORITY

Respondent South Macomb Disposal Authority has no corporate parents, subsidiaries or affiliates.

**RESPONDENTS WASTE
MANAGEMENT, INC., AND CHEMICAL WASTE
MANAGEMENT, INC.**

SUBSIDIARIES

The Brand Companies

The Brand Companies,
subsidiary of Waste
Management, Inc., and
Chemical Waste
Management, Inc.

Chemical Waste Management
of Baja California

Chemical Waste Management
of Baja California,
subsidiary of Waste
Management, Inc., and
Chemical Waste
Management, Inc.

Tratamientos Industriales
Tijuana Internacional,
S.A. de C.V.

Tratamientos Industriales
Tijuana Internacional, S.A.
de C.V., subsidiary of Waste
Management, Inc., and
Chemical Waste
Management, Inc.

Waste Management
International, Inc.

Waste Management
International, Inc.,
subsidiary of Waste
Management, Inc., and
Chemical Waste
Management, Inc.

**RESPONDENTS GENERATORS OF WASTE AT THE
ENVIRONMENTAL CONSERVATION AND CHEMICAL
CORPORATION SITE, In Zionsville, Indiana**

**AFFILIATED ENTITIES INVOLVED WITH
ENVIRO-CHEM SITE**

A. O. Smith Corporation

**A. O. Smith Corporation,
parent corporation to
Hermatic Motor Div.,
located in Milwaukee,
Wisconsin**

**Amtrak National Railroad
Passenger Corporation**

**Amtrak, affiliated with
National Railroad Passenger
Corp., located in Beech
Grove, Indiana**

American Can Company

**American Can Packaging,
Inc., division of American
Can Company, located in
Hoopston, Illinois**

**American National Can
Company, successor to
rights and liabilities of
American Can Company, its
division, American Can
Packaging, Inc., and its prior
successor, National Can
Corporation**

American Standard, Inc.

**American Standard, Inc.,
parent corporation of
American Standard,
Peabody Unit, corporate
headquarters in New York,
New York**

Anaconda-Ericsson, Inc.

Ericsson Cables, Inc., assumed assets and liabilities of Ericsson, Inc., former parent corporation of Anaconda-Ericsson, located in Richardson, Texas

Anderson Development Company

Anderson Development Co., plant and headquarters located in Adrian, Michigan

Arvinyl, Inc.

Arvinyl, division of Arvin Industries, Inc., located in Columbus, Indiana

Roll Coater, Inc.

Roll Coater, Inc., subsidiary of Arvin Industries, Inc., located in Greenfield, Indiana

Arvin Automotive, division of Arvin Industries, Inc., located in Indianapolis, Indiana

Arvin Industries, Inc., parent company of Arvinyl, Roll Coater and Arvin Automotive, with headquarters in Columbus, Indiana

Bemis Company, Inc.

Bemis Company, Inc. (f/k/a Bemis Bag Co.), located in Terre Haute, Indiana, with headquarters in Minneapolis, Minnesota

Bootz Manufacturing Company, Inc.

Bootz Manufacturing Company, Inc., plant and headquarters located in Evansville, Indiana

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**Brenner Engineering &
Manufacturing, Inc.**

**Brenner Engineering &
Manufacturing, Inc.,
affiliated with Handy &
Harman, located in Bedford,
Indiana**

C.T.S. Microelectronics, Inc.

**CTS Microelectronics, Inc.,
located in Lafayette, Indiana**

**CTS Microelectronics, Inc. is
now named CTS
Corporation,
Microelectronics Division**

**CTS Corporation, parent
corporation of CTS
Corporation, Microelectronics
Division, located in Elkhart,
Indiana**

Carpenter Body Works, Inc.

**Carpenter Body Works, Inc.,
plant and headquarters
located in Mitchell, Indiana**

Carter Paint Company, Inc.

**Carter Paint Company, Inc.,
plant and headquarters
located in Liberty, Indiana**

Celotex Corporation

**The Gamble Brothers
Division of the Celotex
Corporation, former division
of Celotex Corporation,
located in Louisville,
Kentucky**

Centralab, Inc.

Nepco/Centralab, a subsidiary company of North American Phillips Corp., located in West Lafayette, Indiana, (Presently, Mepco/Centralab is a division of North American Phillips Corp. named Phillips components Discrete Products Division)

Magnavox Government & Industrial Electronics Company, a subsidiary of North American Phillips Corp., located in Ft. Wayne, Indiana

Chromalloy American Corporation

Precoat Metals, a division of Chromalloy American Corporation

Conco, Inc.

Conco, Inc., a division of H. D. Conkey Co., plant located in Louisville, Kentucky, headquarters located in Mendota, Illinois

Crown Zellerbach Corporation

Crown Zellerbach Corporation, affiliated with James River Corporation, with plants located in Greensburg, Indiana and Hazelwood, Missouri

D&L Paint Company, Inc.

D&L Paint Co., Inc., located in Cambridge City, Indiana, headquarters in Liberty, Indiana

Dennis Chemical Company	Dennis Chemical Company, plant and headquarters in St. Louis, Missouri
Detrex Chemical Industries, Inc.	Detrex Chemical Industries, Inc., parent company of Gold Shield Solvent, located in Southfield, Michigan
Diamond Chain Company	Diamond Chain Company, division of Amsted Industries, Inc., located in Indianapolis, Indiana
Economy Plating Company, Inc.	Economy Plating Company, Inc., plant and headquarters formerly located in Zionsville, Indiana Economy Plating Company, Inc. is now named Electro-Spec Inc., and is now located in Franklin, Indiana
The Egyptian Lacquer Manufacturing Company	Egyptian Lacquer Manufacturing Company, Inc., plant and headquarters located in Lafayette, Indiana
Mid-West Body, Inc.	Midwest Body Mfg., Inc., located in Paris, Illinois
U.S.M. Corporation	Bostik Division, former division of USM Corporation, located in Marshall, Michigan (USM Corporation has been affiliated with Emhart Corporation.)

Bailey Division, former division of USM Corporation (USM Corporation has been affiliated with Emhart Corporation.)

Mallory Capacitor, division of Emhart Industries, Inc., located in Indianapolis, Indiana (Emhart Industries, Inc. has been affiliated with Emhart Corporation.)

Mallory Timers, division of Emhart Industries, Inc., located in Frankfort, Indiana (Emhart Industries, Inc. has been affiliated with Emhart Corporation.)

Emhart Corporation, is now owned by the Black & Decker Corporation, located in Hartford, Connecticut

Federal Mogul Corporation

Federal Mogul Corporation, plants located in Van Wert, Ohio, Frankfort, Indiana, and Mooresville, Indiana, headquarters in Detroit, Michigan

Switches, Inc., former subsidiary of Federal Mogul Corporation

Ford Motor Company	Ford Motor Company, plants located in St. Paul, Minnesota and Louisville, Kentucky, headquarters in Dearborn, Michigan
Foy-Johnston, Inc.	Foy-Johnston, located in Cincinnati, Ohio Foy-Johnston is now named Cincinnati Varnish
General Motors Corporation	The following General Motors Corporate Divisions: Delco Electronics—Kokomo, Indiana Fisher Body Division—Marion, Indiana Chevrolet Division—Indianapolis, Indiana Delco-Remy Division—Anderson, Indiana
The Grote Manufacturing Company	Grote Manufacturing Company, plant and headquarters located in Madison, Indiana
Gulf & Western Manufacturing Company	Bohn Heat Transfer Group, Division of Gulf & Western Mfg. Co., located in Danville, Illinois Bohn Engine & Foundry, division of Gulf and Western Mfg. Co., located in Greensburg, Indiana

	Vickes Manufacturing Co., former subsidiary of Gulf and Western Mfg. Co., located at Southfield, Michigan
H-C Industries, Inc.	H-C Industries, Inc., plant and headquarters located in Crawfordsville, Indiana
Haas Cabinet Company, Inc.	Haas Cabinet Co., Inc., plant and headquarters located in Inc. Sellersburg, Indiana
Hamilton Glass Products, Inc.	Hamilton Glass Company, plant and headquarters located in Vincennes, Indiana
	From 1977-80, National Gypsum Co. owned Hamilton Glass Company
Inmont Corporation	Inmont Corporation, plants located in Bound Brook, New Jersey, Cincinnati, Ohio and Huntington, Indiana, headquarters in Clifton, New Jersey
K.C.L. Corporation	KCL Corporation, plant and headquarters located in Shelbyville, Indiana
Tappan Company	Kemper, a division of The Tappan Company, plant located in Richmond, Indiana

	White Consolidated Industries, parent company of Kemper, headquarters in Cleveland, Ohio
Kimberly-Clark Corporation	Brown-Bridge, a division of Kimberly-Clark Corporation, plants located in Troy, Ohio and Ellina, Ohio
Knauf Fiberglass	Knauf Fiber Glass GmbH, plant and headquarters located in Shelbyville, Indiana
Kolmar Laboratories, Inc.	Kolmar Laboratories, Inc., plant and Executive Offices in Port Jervis, New York
Kyanize Paints, Inc.	Kyanize Paints, Inc., located in Springfield, Illinois Kyanize Paints, Inc. is now named CKP, Inc.
The Lenk Company	Lenk Company, located in Franklin, Kentucky Lenk Company is affiliated with the Drackett Company located in Cincinnati, Ohio
Liberty Solvents and Chemical Company, Inc.	Liberty Solvents and Chemicals Company, Inc., plant and headquarters located in Twinsburg, Ohio
Lilly Industrial Coatings, Inc.	Lilly Industrial Coatings, Inc., plants located in Memphis, Tennessee and Paulsboro, New Jersey, with Corporate Office in Indianapolis, Indiana

Louisville Varnish
Company, Inc.

Louisville Coatings, Inc.,
plant located in Louisville,
Kentucky

Kurfes Coatings, Inc.,
Louisville, Kentucky,
acquired Louisville Coatings
in 1984

Edward H. Marcus Paint
Company, Inc.

E. H. Marcus Paint Co.,
Inc., plant and headquarters
located in Louisville,
Kentucky

E. H. Marcus Paint
Company is now named
Marcus Paint Company

Mobil Chemical Company

Mobil Chemical Co., plant
located in Louisville,
Kentucky

Mobil Oil Corporation,
parent of Mobil Chemical
Company, New York, New
York

Paulo Products Company

Paulo Products Company,
plant and headquarters
located in St. Louis,
Missouri

Potlatch Corporation

Potlatch Corporation, plant
located in Louisville,
Kentucky, with headquarters
in San Francisco, California

Potter Paint Company
of Indiana, Inc.

Potter Paint Company of
Indiana, Inc., plant and
headquarters in Cambridge
City, Indiana

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Pratt & Lambert, Inc.	Pratt & Lambert, plants located in Buffalo, New York, Kansas City, Missouri and Carlstadt, New Jersey, headquarters in Buffalo, New York
Radio Material Company	Radio Materials Corporation, plant and headquarters located in Attica, Indiana
Ramsey Corporation	Ramsey Corporation, a former subsidiary of TRW, Inc., plant located in North Manchester, Missouri
	Ross Gear, a division of Ramsey Corporation, plant located in Indiana
	TRW, Inc., located in Cleveland, Ohio
Reliance Electric Company	Reliance Electric Company, one plant located in Madison, Indiana, and two in Columbus, Indiana, with headquarters in Cleveland, Ohio
Rexham Corporation	Rexham Corporation, plant located in Edinburgh, Indiana, headquarters in New York, New York
Robbie Manufacturing, Inc.	Robbie Manufacturing, Inc., plant and headquarters located in Lenera, Kansas

Rostone Corporation

Rostone Corporation, a division of Allen-Bradley Co., with plant located in Lafayette, Indiana

Solvent Recovery Service, Inc.

Solvent Recovery Service of New Jersey, Inc.

Solvent Recovery Service of New England, Inc.

Solvent Recovery Service, Inc., holding company of above operating entities

Smith Cabinet Manufacturing Company, Inc.

Smith Cabinet Manufacturing Co., Inc., plant and headquarters located in Salem, Indiana

Sparton Indiana, Inc.

Sparton Indiana, Inc.

Sparton Indiana, Inc. is now known as Sparton Engineered Products, Inc.—KPI Group

Square D Company

Square D Company, plants located in Oxford, Ohio, Peru, Indiana and Huntington, Indiana, headquarters at Palatine, Illinois

St. Regis Paper Company

St. Regis Paper Company, former subsidiary of St. Regis Corporation, plants located in Marion, Indiana and Louisville, Kentucky

	Champion International Corporation acquired St. Regis Paper Company and St. Regis Corporation in 1984-85
The Stolle Corporation	The Stolle Corporation, plant located in Sidney, Ohio
Sun Chemical Corporation	Sun Chemical Corporation, plant in Frankfort, Indiana
	Sun Chemical Corporation, General Printing Ink Div., plant in Northlake, Illinois
	Sun Chemical Corporation is now named Sequa Corporation
Techtronics Ecological Corporation	Techtronics Ecological Corporation (changed name from Techtronics Solvents Recycling Corporation in early '80s), plant and headquarters located in Brooklyn, New York
Thiele-Engdahl, Inc.	Thiele-Engdahl, Inc., plant located in South Plainfield, New Jersey and headquarters in Winston-Salem, North Carolina
U.S. Gypsum/Durabond Products Company	Durabond Products Company, a subsidiary of United States Gypsum Company, plant located in Rosemont, Illinois

DAP Inc. is successor in interest to Durabond Products Company

Union Carbide Corporation

Union Carbide Corporation, plants located in Bound Brook, New Jersey, Kentland, Indiana, Paducah, Kentucky, Indianapolis, Indiana and Centerville, Iowa, headquarters located in Danbury, Connecticut

Universal Woods, Inc.

Universal Woods, Inc., plant located in Louisville, Kentucky, headquarters in Richmond, Virginia.

Wayne Corporation

Wayne Transportation Division, a division of Wayne Corporation, plant located in Richmond, Indiana

Western Electric

Western Electric Company, Inc., affiliated with AT&T, two plants located in Indianapolis, Indiana (2525 Shadeland Avenue, Indianapolis Work and 2855 No. Franklin Road—Indiana Service Center)

AT&T, parent organization of Western Electric Company, Inc., located in Berkeley Heights, New Jersey

Ra 21

Westvaco

**Westvaco U.S. Envelope
Division, division of
Westvaco Corporation, plant
located in Indianapolis,
Indiana**

Whittaker Corporation

**Dayton Coatings &
Chemical, a division of
Whittaker Corporation,
plant located in West
Alexandria, Ohio**

**Zimmer Paper Products,
Incorporated**

**Zimmer Paper Products,
Inc., plant located and
headquartered in
Indianapolis**

JAN 7 1991

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

CRANFORD INSURANCE COMPANY,
now known as AMERICAN SPECIAL
RISK INSURANCE COMPANY, a Delaware
Corporation; SPHERE INSURANCE
COMPANY, LTD., now known as
SPHERE DRAKE INSURANCE, PLC,
a British Corporation;
INTERNATIONAL INSURANCE COMPANY,
an Illinois Corporation,
Petitioners,

v.

ROHM & HAAS COMPANY; SOUTH MACOMB
DISPOSAL AUTHORITY; WASTE MANAGEMENT, INC.;
CHEMICAL WASTE MANAGEMENT, INC.;
GENERATORS OF WASTE AT THE
ENVIRONMENTAL CONSERVATION AND
CHEMICAL CORPORATION SITE, in
Zionsville, Indiana,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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January 4, 1991

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No. 90-631

**In The
Supreme Court of the United States
October Term, 1990**

CRANFORD INSURANCE COMPANY,
now known as AMERICAN SPECIAL
RISK INSURANCE COMPANY, a Delaware
Corporation; SPHERE INSURANCE
COMPANY, LTD., now known as
SPHERE DRAKE INSURANCE, PLC,
a British Corporation;
INTERNATIONAL INSURANCE COMPANY,
an Illinois Corporation,
Petitioners,

v.

ROHM & HAAS COMPANY; SOUTH MACOMB
DISPOSAL AUTHORITY; WASTE MANAGEMENT, INC.;
CHEMICAL WASTE MANAGEMENT, INC.;
GENERATORS OF WASTE AT THE
ENVIRONMENTAL CONSERVATION AND
CHEMICAL CORPORATION SITE, in
Zionsville, Indiana,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
PETITIONERS' REPLY BRIEF**

Petitioners make the following reply to the Response filed in the above matter to their Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.¹

¹ Pursuant to Sup.Ct.R. 29.1, Petitioners provided a list of parents and subsidiaries in their Petition for Writ of Certiorari (Petition) at ii. The list remains unchanged.

I. PROTECTIVE ORDER MODIFICATION

A. This Conflict Is Not Fact Dependent

Respondents argue that the Circuit Courts of Appeal are not truly in conflict as to the standard by which a court may modify protective orders in dismissed cases in order to grant a non-party access to discovery materials. However, the Tenth Circuit Court of Appeals found that such a conflict existed, and elected in this case to adopt the rule fashioned by the Seventh and Ninth Circuits. See Petition 6a-7a. One federal judge described this area of the law as being in a state of "chaos". *H.L. Hayden Co. of N.Y. v. Siemens Med. Systems*, 106 F.R.D. 551, 552 (S.D.N.Y. 1985).²

The Second Circuit Court of Appeals, in *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), and the Eighth Circuit in *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied sub nom. Iowa Beef Processors, Inc. v. Smith*, 441 U.S. 907 (1979), have presumed the continued integrity of protective orders and have placed a "burden of persuasion" upon the movants, requiring them to first demonstrate a compelling need or extraordinary circumstance before the Court would balance the interests of continued protection against those interests supporting disclosure. The Circuit Courts of Appeals for the Seventh Circuit and the Ninth Circuit have created a presumption in favor of disclosure, and have placed the burden of persuasion upon the parties opposing modification of the protective order to demonstrate tangible prejudice to their substantial rights. *Wilk v. American Medical Ass'n*, 635 F.2d 1295 (7th Cir. 1980); *Olympic Refining Co. v. Carter*, 332

² Other commentators have observed a conflict among the Circuits on this issue, and have called for, or suggested, the adoption of a uniform rule governing practice in this area. See, e.g., Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 43 & nn. 181 & 182 (1983); Sherman & Kinnard, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 286 n. 182 (1982); Annot., 85 A.L.R. Fed. 538 (1987).

F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964). Respondents grossly oversimplify this real conflict when they assert that the decisions in *Martindell* and *Iowa Beef* turned on the governmental status of the intervenor, and that in all cases the Courts were merely applying the Fed.R.Civ.P. 26(c) "good cause" requirement to the facts before them. The governmental status of the intervenors in *Martindell* and *Iowa Beef* was merely one factor tending to diminish the "compelling need" for modification of a protective order. The same standard was applied to private sector intervenors by the Second Circuit in *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982), and by the court in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F. Supp. 866 (E.D.Pa. 1981).

This case provides this Court with a particularly appropriate opportunity to resolve this conflict, precisely because it arises out of such a clear and commonplace factual context. The intervenors do not have governmental or media status. There are no other singular factual circumstances which might narrow the scope of a definitive ruling on the issues raised by Petitioners.

B. Non-Parties Have No Public Right Of Access To Discovery Materials

It is misleading for Respondents to invoke the "time-honored tradition that civil discovery take place in the public eye". Response at 7. Most civil discovery does not take place in public, and never has. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), this Court recognized this fact, and approved the adoption of local court rules and protective orders to restrict or control public access to discovery materials. The reliance on a contrary conception of a public right to discovery materials which underlies the Ninth Circuit's 1964 Opinion in *Olympic Refining* and other authorities cited by Respondents provides further reason for this Court to address the standards for modifying protective orders for the benefit of non-parties.

C. Policies Favoring "Shared Discovery" Do Not Apply To This Case

Respondents appeal to the favored concept of "shared discovery" and argue that Petitioners improperly seek to prevent use of information in collateral litigation.³ "Shared discovery" typically refers to the exchange of technical information by a large number of plaintiffs litigating common factual issues in product liability cases against one or more manufacturers with disproportionately greater resources. These defendants are usually "prejudiced" by "shared discovery" only to the extent that it augments the resources of the various plaintiffs. It takes place in active litigation, under the supervision of judges aware of the issues posed by the individual cases. These factors have no relevance to this case, where a protective order was modified by a judge unfamiliar with Respondents' various lawsuits, so as to provide Respondents unfettered access to documents produced in reliance on that order, in a case which had been settled and dismissed for almost three years.⁴

³ It is unfair to so mischaracterize Petitioners' objection to the wholesale release of materials once produced under the protective order entered in *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990). Petitioners have consistently recognized that many of those same materials, to the extent they are unprivileged and relevant to Respondents' lawsuits, could be discovered in those suits. This procedure would preserve Petitioners' right and ability to raise the issues of relevancy and privilege in each case — a concern rarely present in the typical "shared discovery" setting.

⁴ Respondents' suggestion that the issues raised by Petitioners are moot is baseless. Respondents indicate only that "[b]ecause the resolution of this type of discovery dispute is fact dependent and subject to the trial court's discretion in each case, the 'capable of repetition yet evading review' exception permitting review of moot questions does not justify review in this case." Response at 4 n. 2. Respondents' sole authority for this point is *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 n. 5 (1974). However, nothing in *DeFunis* even remotely suggests that application of the "capable of repetition yet evading review" exception to the mootness doctrine turns upon whether the challenged decision was fact dependent or discretionary. Not surprisingly, the focus on this issue in *DeFunis* instead

The court in *Zenith Radio Corp.* recognized that “there is a qualitative difference between sustaining the confidentiality of a single document at the time of its designation and sustaining the confidentiality of hundreds of thousands of documents en masse years after they have been produced and given a confidentiality designation” 529 F. Supp. at 893. Thus it is appropriate to place a threshold burden upon the party seeking disclosure in such cases. It is unfair, impractical and illogical to review cases such as this by the standards applied to “shared discovery” or other initial motions for protective orders covering a limited and well-defined class of materials or information.

II. JURISDICTION

Respondents first argue that this Court’s decisions in *Owen Equipment Co. & Erection Co. v. Kroger*, 437 U.S. 365 (1978), and *Finley v. United States*, 490 U.S. 545 (1989), concerning the limits of diversity jurisdiction are inapplicable because neither involved a “permissive intervenor making a limited discovery request but not seeking to assert a claim or defense in the action.” Response at 16. Respondents’ attempt to distinguish *Kroger* and *Finley* misses the point. Those cases and this case all involve situations where a court is asked to take

was upon whether the question presented was “‘capable of repetition’ so far as [the petitioner was] concerned”, and whether it would “in the future evade review.” 416 U.S. at 319. And indeed, contrary to Respondents’ cursory suggestion, the “capable of repetition yet evading review” exception to the mootness doctrine does in fact apply even to the review of questions arising from discretionary, fact-dependent decisions. See *Reid v. I.N.S.*, 766 F.2d 113, 114 (3d Cir. 1985); *United States v. Peters*, 754 F.2d 753, 757–58 (7th Cir. 1985); *United States v. Edwards*, 672 F.2d 1289, 1291–92 (7th Cir. 1982); *Quintana v. Califano*, 623 F.2d 128, 129–30 (10th Cir. 1979); *Golden Holiday Tours v. Civil Aeronautics Board*, 531 F.2d 624, 626 (D.C. Cir. 1976). Cf. also *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 6 (1986); *United States v. New York Telephone Co.*, 434 U.S. 159, 165 n. 6 (1977); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 546–48 (1976); *In Re Reporters Comm. For Freedom of the Press*, 773 F.2d 1325, 1328–29 (D.C. Cir. 1985).

jurisdiction of a party for whom no independent basis of jurisdiction exists. Nowhere did this Court in *Kroger* or *Finley* limit its discussions to the situation described by Respondents. Further, despite Respondents' statement that they were "not seeking to assert a claim or defense in the action", they cannot dispute that their role in the action is an offensive one; a role that this Court has expressly stated is not the typical situation to which ancillary jurisdiction applies. *Kroger*, 437 U.S. at 376.

Respondents next assert that a lack of an independent jurisdictional basis is not fatal where an intervenor does not seek involvement in the merits of the underlying suit but, rather, only seeks access to discovery. Respondents provide no authority for such a distinction. Neither Fed.R.Civ.P. 24 nor case law make such distinctions. See, *Int'l Paper Co. v. Inhabitants of the Town of Jay, Me.*, 887 F.2d 338, 346-47 (1st Cir. 1989) (rejecting intervenor's argument "that since it is seeking 'simply to make it views known concerning a statute' rather than to assert a claim, it does not make sense to require it to establish an independent ground for jurisdiction.") Further, Respondents' citation to the Tenth Circuit's statement that "the most important circumstance in this case is that intervention was not on the merits, but for the sole purpose of challenging a protective order", Response at 16, quoting 905 F.2d at 1427, is a gross misrepresentation of that Court's decision. The Tenth Circuit made that observation in the context of addressing the argument on the timeliness of the intervention request, not in the context of determining jurisdiction.

Indeed, Respondents' involvement in the underlying action only for the purpose of seeking access to discovery points out the inappropriateness of extending the doctrine of ancillary jurisdiction to the request. The concept of ancillary jurisdiction is based on the needs "to protect legal rights or effectively to resolve an entire, logically entwined lawsuit." *Kroger*, 437 U.S. at 377. Seeking access to discovery — Respondents' alleged purpose for intervention — does not

invoke either of those needs. They have never claimed that intervention was necessary to protect any legal right, nor could they legitimately do so in view of the fact that they could accomplish the same result by pursuing discovery in their pending cases. Similarly, they do not argue that intervention is necessary to resolve an entire, logically entwined lawsuit. Here again, they could not do so in view of the fact that the main action has been dismissed for several years.

Respondents' citation of *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980), is nothing more than an attempt to divert attention from the undisputed fact that no independent basis of jurisdiction exists. In *Navarro*, the plaintiffs were eight individual trustees of a business trust suing in their own names. The defendant argued that the trust beneficiaries, not the plaintiff trustees, were the real parties to the case whose citizenship controlled for purposes of determining diversity. This is an entirely different — and wholly irrelevant — question from that of whether a permissive intervenor must have an independent basis of jurisdiction.

Further, although Respondents now disclaim party status⁵ in an attempt to argue that their citizenship is irrelevant for purposes of the court's diversity jurisdiction, by seeking intervention Respondents became parties to the action. See generally 7C, C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1920 (2d ed. 1986) ("the intervenor is treated as if he were an original party and has equal standing with the original parties"); *Int'l Paper Co.*, 887 F.2d at 347. Indeed, Respondents so argued below:

"... Intervenor[s] are parties to this litigation. Once the trial court granted the motion to intervene, Intervenor[s] became full participant[s] in the lawsuit and [were] treated just as if [they] were ... original part[ies]." 25 a.

⁵ To accept Respondents' argument that they are not real parties would appear to result in a situation where the proceedings are pursued by no one, for the present proceedings were brought solely by Respondents.

As parties, Respondents' citizenship cannot be ignored.

Finally, Respondents' reliance on *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U.S. 48 (1922), is misplaced. *Wichita* was decided before enactment of Fed.R.Civ.P. 24 and involved a situation more analogous to intervention of right under the present rules than to permissive intervention under Rule 24.⁶ Further, this Court's post-*Wichita* decisions in *Hoffman v. McClelland*, 264 U.S. 552 (1924) (affirming district court's finding of no jurisdiction of intervenors' claim where independent jurisdictional grounds were lacking), and *Fulton National Bank of Atlanta v. Hozier*, 267 U.S. 276 (1925) (disallowing intervention by drawer of check in receivership of his payee in absence of independent jurisdictional grounds), suggest that *Wichita* does not have the sweeping effect asserted by Respondents.

Respondents do not dispute that they lack an independent basis of federal jurisdiction on which to base the action. Their attempt to argue that since they are purportedly seeking involvement in the underlying action only to pursue discovery, the lack of jurisdiction is not fatal despite the general rule that a permissive intervenor must show an independent basis of jurisdiction is unsupported by authority. The Petition for Writ of Certiorari should be granted to clarify the limits of federal jurisdiction over permissive intervenors.

III. RULE 24 REQUIREMENTS

Contrary to Respondents' oversimplified opposition, Petitioners' third issue encompasses significantly more than a mere "technical" application of a "meaningless" pleading requirement of Rule 24(c). Response at 18. Rule 24(c)'s pleading requirement is clearly intended to facilitate evaluation of, and compliance with, Rule 24(b) (2)'s require-

⁶ The *Wichita* Company sought to prohibit the defendant Commission from raising the rates charged by a Kansas company for electricity sold to the *Wichita* company. The Kansas company was allowed to intervene in support of the Commission's order.

ment that "the applicant's claim or defense and the main action have a question of law or fact in common." Notwithstanding any interests served by liberal construction, permissive intervention under Rule 24(b)(2) clearly remains inappropriate when the applicant fails to advance an interest sufficient to support a legal claim or defense common to the main action. See *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring); *Shevlin v. Schewe*, 809 F.2d 447, 449-50 (7th Cir. 1987); *California v. Tahoe Regional Planning Agency*, 792 F.2d 779, 781-82 (9th Cir. 1986); *Wade v. Goldschmidt*, 673 F.2d 182, 185-87 (7th Cir. 1982); *Howse v. S/V "Canada Goose I"*, 641 F.2d 317, 321-23 (5th Cir. 1981); *Dickerson v. U.S. Steel Corp.*, 582 F.2d 827, 831-34 (3d Cir. 1978); *Dowdy v. Hawfield*, 189 F.2d 637, 638-39 (D.C. Cir.), cert. denied, 342 U.S. 830 (1951). See also 7C, C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1911 (2d ed. 1986).

The authority overlooking Rule 24(c)'s pleading requirement generally concerns a situation where the applicant in fact had an interest sufficient to support a claim or defense as contemplated by Rule 24(b)(2), but merely failed to properly plead it. See *Shevlin*, 809 F.2d at 449-50; *Farina v. Mission Investment Trust*, 615 F.2d 1068, 1074-75 (5th Cir. 1980); *Spring Construction Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980); *WJA Realty Ltd. Partnership v. Nelson*, 708 F. Supp. 1268, 1272 (S.D.Fla. 1989); *Yankee Bank for Finance & Savings, FSB v. Hanover Square Associates-One Limited Partnership*, 693 F. Supp. 1400, 1409-10 (N.D.N.Y. 1988); *Belgin American Mercantile Corp. v. De Grove-Marcotte & Fils*, 433 F. Supp. 1098, 1101 (S.D.N.Y. 1977); *Alexander v. Hall*, 64 F.R.D. 152, 156-59 (D.S.C. 1974); *Benner v. Philadelphia Musical Soc., Local 77, of Am. Federation of Musicians*, 32 F.R.D. 197, 199 (E.D.Pa. 1963); 3B, J. Moore & J. Kennedy, *Moore's Federal Practice*, ¶ 24.14 & nn. 3 & 4 (2d ed. 1990). When the applicant can otherwise advance such an interest, some courts overlook Rule 24(c)'s pleading requirement as an unnecessary formality.

In the protective-order modification context here, however, the Tenth Circuit and a few others have effectively disregarded Rule 24 in its entirety. What is then characterized as permissive "intervention" under Rule 24(b)(2) has absolutely none of the necessary characteristics. In the Tenth Circuit's view, proposed "intervenor" such as Respondents need not file a pleading, or even incorporate a pleading by reference; they need not be a party; they need not even have a claim or defense with factual or legal questions common to the main action. In the Tenth Circuit, the main action also may even have been dismissed as to all parties years before, and the Judge in the main action then encounters only issues raised by non-parties concerning discovery in an action over which the court has no jurisdiction.

This situation readily demonstrates that Rule 24 is neither intended nor appropriate for accommodating non-party participation in a closed case for the sole purpose of obtaining discovery in an unrelated action. The invariable result in this context is sham intervention and the needless expenditure of judicial resources. As Petitioners explained in their Petition for A Writ of Certiorari, clarification in this area therefore is indeed appropriate.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Tenth Circuit entered on June 15, 1990.

Respectfully submitted,

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January 4, 1991

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**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED NUCLEAR CORPORATION,
Plaintiff-Appelles,

v.

No. 89-2205

CRANFORD INSURANCE COMPANY, now
known as AMERICAN SPECIAL RISK
INSURANCE COMPANY, a Delaware
Corporation, SPHERE INSURANCE COMPANY,
LTD., now known as SPHERE DRAKE
INSURANCE, PLC, a British Corporation,
INTERNATIONAL INSURANCE COMPANY, an
Illinois Corporation,
Defendants-Appellants,

and

NORTHBROOK EXCESS AND SURPLUS
INSURANCE COMPANY, formerly known as
NORTHBROOK INSURANCE COMPANY, an
Illinois Corporation,
Defendants,

ROHM AND HAAS COMPANY, SOUTH MACOMB
DISPOSAL AUTHORITY, WASTE MANAGEMENT,
INC., CHEMICAL WASTE MANAGEMENT, INC.,
GENERATORS OF WASTE AT THE ENVIRONMEN-
TAL CONSERVATION AND CHEMICAL
CORPORATION SITE, in Zionsville, Indiana,
Intervenors-Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**HONORABLE E.L. MECHEM
DISTRICT JUDGE**

INTERVENORS-APPELLEES' RESPONSE BRIEF

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LIST OF PRIOR OR RELATED APPEALS

Pursuant to Rule 28.2 (a) of the Rules of the United States Courts of Appeals for the Tenth Circuit, Intervenor-Appellees certify that there are no prior or related appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction over an appeal from a non-final discovery order allowing intervention and discovery sharing, particularly in light of on-going discovery proceedings in the trial court.
2. Whether the trial court's decision to allow intervention based on findings of timeliness, no prejudice to defendants, and Intervenor's interest in shared discovery was neither clearly erroneous nor an abuse of discretion.
3. Whether the trial court properly exercised its discretion in ruling that the Intervenor had standing to seek a modification of the protective order in order to engage in discovery sharing and based on expressed willingness to be bound by the modified protective order.
4. Whether the trial court properly exercised its discretion in allowing intervention and modification of the protective order upon findings of good cause for such a modification and that the discovery ordered would not affect defendants' rights under the protective order or the settlement agreement.

I.

STATEMENT OF RELEVANT FACTS

A. The UNC Litigation

1. In 1985, United Nuclear Corporation ("UNC") filed a declaratory judgment action, urging the court that Cranford Insurance Company (n/k/a/ American Special Risk Insurance Company) ("ASRIC") and International Insurance Company ("International"), (collectively, "Appellants") were liable to UNC under environmental impairment liability ("EIL") insurance policies. Docket Number ("Doc.") 31 at 3-4. Appellants removed this action to the United States District Court for the District of New Mexico on June 20, 1985. Doc. 1.

2. The parties exchanged discovery requests and took depositions. *See, e.g.*, Doc. 47, 56,60, 63, 139-45. During the course of discovery, the trial court entered two protective orders. On February 19, 1986, the court entered a protective order that deemed all documents produced in discovery to be confidential and limited access to the documents to a small group of people. Doc. 66. The court amended the protective order on May 10, 1986 to, *inter alia*, extend the protective order to certain named non-parties. Doc. 90.

3. The UNC matter settled on August 18, 1986. Doc. 137. At that time, the court ordered that the court file be sealed and that depositions and exhibits not be disclosed to anyone. Doc. 136.

B. The Intervenor's Litigation

4. On November 8, 1983, numerous generators of waste that was transported to the Environmental Conservation and Chemical Corporation ("Enviro-Chem") site in Zionsville, Indiana, Intervenor-appellees Enviro-Chem generators, filed a third-party complaint against Appellants in the United States District Court for the Southern District of Indiana. Doc. 143 at 4 and exhibit G. The third-party plaintiffs are insured

under two EIL policies issued to Enviro-Chem by Appellants. *Id.* Appellants have denied coverage for Superfund clean-up liabilities, based upon various policy provisions. *Id.* The meaning of the EIL policies will be the key issue in the litigation. *Id.*

5. On October 5, 1987, Intervenor-appellees Waste Management, Inc. and Chemical Waste Management, Inc. filed an action in the Circuit Court of Cook County, Illinois against ASRIC and another EIL insurer to recover EIL insurance proceeds for three underlying actions. Doc. 143 at 5 and exhibit G. Later that day, International and ASRIC filed suit in the same court against Intervenor-appellees Waste Management, Inc., Chemical Waste Management, Inc. and SCA Services, Inc. (collectively, "WMI"), which, as later amended, seeks a declaration of non-coverage for the three lawsuits and two additional sites. *Id.* The litigants contest, among other things, the meaning of certain policy terms. *Id.*

6. On December 1, 1987, Intervenor-appellee Rohm and Haas Company filed an action in the Superior Court of New Jersey against, among others, International for a declaratory judgment of EIL insurance coverage for ten underlying sites that have been the subject of litigation, administrative actions and clean-ups. Doc. 143 at 7 and exhibit G. At issue in the litigation is the interpretation of three EIL policies issued by International. *Id.*

7. On August 6, 1984, Intervenor-appellee South Macomb Disposal Authority ("SMDA") filed a declaratory judgment against three EIL carriers, including International and ASRIC, in Circuit Court of Macomb County, Michigan seeking coverage for a number of claims made against it with respect to its operation of two former landfills in Macomb County. Doc. 143 at 8 and exhibit G.

C. The Intervention

8. On May 2, 1989, the Enviro-Chem generators, WMI, Rohm and Haas Company and SMDA (collectively, "Intervenors")

moved to intervene in the UNC litigation for the sole purpose of modifying the protective orders and obtaining access to the court file, depositions, and documents produced during discovery by the Appellants. Doc. 142. Intervenor expressly disclaimed interest in any documents regarding UNC's claims against their comprehensive general liability insurance carriers or about the underlying hazardous waste lawsuits. *Id.* at 2. Intervenor also expressly agreed to be bound by the amended protective order and to use the newly gained information only for the purposes of their own lawsuits. *Id.*; see also Doc. 158 at 2-3.

9. On August 14, 1989, the trial court granted the motion to intervene. Doc. 158 at 5. The court made the express factual finding "that the interpretation of EIL policies issued by or through defendants Cranford/ASRIC and International, which was the subject of the UNC case, is common to the movants' pending litigation. Information obtained through discovery in the UNC case is therefore relevant to the movants' present litigation." *Id.* at 4. The court also expressly held that "[Appellants] would be obligated to duplicate and produce [relevant information from the UNC file] in the pending lawsuits." *Id.* at 5.

10. The court further granted the motion to unseal the court file and modify the protective order and allowed Intervenor to use the information solely for the purpose of litigating their current lawsuits. Doc. 158 at 5-6. The court's ruling expressly held Intervenor to "be otherwise fully bound by the terms of the existing protective order." *Id.* at 6.

11. The Intervenor served a deposition subpoena on Richard Mackenzie, counsel for UNC. Doc. 159. The Appellants filed a motion to quash the subpoena, which the court denied. Doc. 160 and 163. The court further denied the Appellants' motion for a stay of the subpoena pending appeal. See Doc. 166. The Appellants applied to this Court for an emergency stay of the subpoena pending appeal, which this Court denied by Order of September 14, 1989.

12. The deposition proceeded on September 7 and 8, 1989; Appellants produced some of the documents but withheld most of them. Brief in Chief at 15. The withheld documents are the subject of a pending motion to compel. Doc. 168.

II.

ARGUMENT

POINT I. THIS COURT LACKS JURISDICTION OVER THIS APPEAL FROM A NON-FINAL DISCOVERY ORDER ALLOWING INTERVENTION AND DISCOVERY SHARING, PARTICULARLY IN LIGHT OF ONGOING DISCOVERY PROCEEDINGS IN THE TRIAL COURT.

A. Applicable Standard of Review.

This Court must satisfy itself that jurisdiction is proper in every case, thus, jurisdiction is a question for the appellate court to decide. *See Delgado Oil Co. v. Torres*, 785 F.2d 857, 859 (10th Cir. 1986).

B. This Court Lacks Jurisdiction Over an Appeal From a Non-Final Discovery Order, Particularly in Light of Ongoing Discovery Proceedings in the Trial Court.

As Appellants concede, discovery orders are interlocutory and non-appealable. Brief in Chief at 5. The order granting the intervention and modification of the protective order is a simple discovery order. The facts that discovery was served (Doc. 159) and a motion to compel was filed (Doc. 168) after the trial court granted the motion to intervene and modify the protective order best indicate that this order is not ripe for appeal.

Interlocutory relief on appeal from discovery orders is unavailable absent extraordinary circumstances not present here. See, e.g., *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Paramount Film Dist. Corp. v. Civic Center Theater*, 333 F.2d 358, 361–62 (10th Cir. 1964). Production of documents by order of the trial court does not constitute irreparable harm that would invoke the collateral order doctrine allowing interlocutory appeal. *Id.*; *Dillie v. Carter Oil Co.*, 174 F.2d 318 (10th Cir. 1949) (*per curiam*). Where this Court rejected interlocutory relief based on a claim that compliance with discovery ordered by the court below might violate the laws of a foreign country, *Finesilver*, 546 F.2d at 342, Appellants' claims afford them no greater entitlement to what is essentially interlocutory relief.

Moreover, as Appellants correctly note, a final judgment is an "order that ends the litigation." Brief in Chief at 5, quoting, 6 *Moore's Federal Practice*, paragraph 54.02 (1988). They are incorrect, however, that this litigation has ended. In fact, Intervenor filed a deposition subpoena duces tecum after the intervention was granted. Doc. 159. When Appellants refused to allow production of documents during that deposition, Intervenor moved to compel production of the documents. Doc. 168. Intervenor's motion to compel remains pending.

Such ongoing discovery proceedings in the trial court following entry of the order granting intervention and discovery require a ruling that the orders appealed from is not a final order and that this Court lacks jurisdiction over this appeal. This appeal should be dismissed for lack of jurisdiction.

POINT II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING INTERVENTION

A. Applicable Standard of Review.

This Court has consistently held that permissive intervention under Federal Rule of Civil Procedure 24(b) is clearly discretionary with the trial court. *Shump v. Balka*, 574 F.2d 1341, 1345 (10th Cir. 1978) (collecting cases). This Court will not reverse a trial court's ruling on intervention unless the opposing party proves a clear abuse of discretion. *Id.*

B. Federal Law Recognizes the Value of Sharing Discovery.

The Federal Rules of Civil Procedure encourage mechanisms that will expedite discovery. In fact, the vast majority of courts, including this Court, have consistently recognized the value of some type of shared discovery¹ to effectuate the admonition of the Rules for speedy and inexpensive litigation.

Federal Rule of Civil Procedure 1 states that the rules shall "be construed to secure the just, speedy and inexpensive determination of every action." The Seventh Circuit, for example, has specifically relied on Rule 1 to grant relief

¹ Opinions from across the country support the trial court's decision to allow intervention and modification of the protective order. See *ETC. v. Standard Financial Management Co.*, 830 F.2d 404 (1st Cir. 1987); *United States v. GAF Corp.*, 596 F.2d 10 (2nd Cir. 1979); *Cipollone v. Liggett Group, Inc.*, 882 F.2d 335 (3d Cir. 1987); *Superior Oil Co. v. American Petrofina Co.*, 785 F.2d 130 (5th Cir. 1986); *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545 (N.D. Tex. 1985); *Meyer Goldberg, Inc. v. Fisher Foods*, 823 F.2d 159 (6th Cir. 1987); *In Re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 1295 (7th Cir. 1980); *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir.), cert. denied, 379 U.S. 900 (1964); *Wyeth Laboratories v. United States District Court*, 851 F.2d 321, 323 (10th Cir. 1988); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985).

such as that granted by the court below. *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1980). In granting intervention and allowing access to discovery, the court spoke to the efficacy of sharing discovery: "When litigants seek to use discovery in aid of collateral litigation on similar issues, . . . access . . . materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process . . . we are impressed with the wastefulness of requiring the [intervenor] to duplicate discovery already made." *Id.*

This Court has also recently recognized the efficacy of sharing discovery. *Wyeth Laboratories v. United States District Court*, 851 F.2d 321, 323 (10th Cir. 1988). Although this Court was constrained to reverse the trial court's establishment of a discovery library for lack of jurisdiction, *id.* at 324, the Court affirmed the principle that discovery sharing best serves the interests of the judiciary and litigants:

The time and effort spent in future litigation could be reduced by eliminating the need for others to conduct discovery to obtain material that has already been disclosed. The time needed to prepare for future trials would be greatly reduced by the availability of the material the court would include in the library. The time saved by lawyers would naturally translate into cost savings for clients. The court's effort is laudable and just.

Id. at 323-34. For the very same reasons of judicial economy and savings to the parties, the trial court properly relied upon the policy of discovery sharing embraced by this Court in *Wyeth Laboratories* to grant intervention and access to common discovery.

C. The Trial Court Properly Ruled That Intervention is the Appropriate Mechanism to Further Discovery Sharing.

To further the goal of expeditious litigation, the Federal Rules provide that similarly-situated litigants can intervene

into existing litigation, so that all interests can be adjudicated in one action. Fed. R. Civ. P. 24. Courts have long recognized the value of intervention to gain access to discovery. In *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir.), cert. denied, 379 U.S. 900 (1964), plaintiffs in another action intervened in a previously settled matter to obtain access to discovery. They intervened without objection and were successful in obtaining the documents. *Id.* at 265-66. Indeed, that court expressly ruled that the fact that the intervenor could obtain the same information through discovery in its own case was immaterial. *Id.* at 266.

Courts have subsequently built upon this precedent and held that intervention is the appropriate mechanism to modify a protective order to acquire discovery from other litigation. *Martindell v. International Telephone & Telegraph*, 594 F.2d 291, 294 (2nd Cir. 1979) (“[t]he proper procedure . . . was . . . to seek permissive intervention in the private action pursuant to Rule 24(b) for the purpose of obtaining vacation or modification of the protective order”); *Puerto Rico Aqueduct and Sewer Authority v. Clow Corp.*, 111 F.R.D. 65, 67 (D.P.R. 1986) (“[i]ndeed the proper way for a third party to challenge a protective order [to obtain discovery] is to intervene in the main action pursuant to Fed. R. Civ. P. 24(b) for the limited purpose of seeking modification of the protective order”).

D. Because Intervention Opinions Not Related to Discovery Are Irrelevant, Issues of Timeliness and Interest Relating to the Property are not Reasons for Denying Intervention; Appellants’ Reliance Thereon is Misplaced.

The Appellants disregard the substantial line of precedent allowing intervention for discovery sharing and rely only on opinions which they concede are not analogous. Brief in Chief at 17. *Cf. Sanguine, Ltd. v. United States Department of Interior*, 736 F.2d 1416 (10th Cir. 1984) (court granted

intervention of right to contest substantive issue of oil and gas leases thirty days after entry of judgment). Accordingly, the Appellants' reliance on this irrelevant precedent substantially weakens their argument that the Court erred in granting intervention.

1. The Trial Court Correctly Ruled That Timeliness Did Not Prevent It From Granting Intervention.

Appellants' misapplication of the correct standard for granting intervention is best exemplified by their argument that the present intervention was untimely. Appellants' argument misses the fundamental purpose behind the timeliness requirement.² Often an intervenor comes into a case because it asserts a stake in the substantive outcome of that case. It is incumbent, therefore, for the intervenor to become part of the litigation as early as possible in order to exercise its rights under federal law to achieve its desired outcome.

Intervenors in this case, however, only sought to intervene for the limited purpose of modifying the protective order and obtaining certain specific discovery; they did not express an interest in the substantive disposition of the *UNC* litigation. Intervenors' sole desired outcome is to modify the protective order and gain access to the relevant documents. The timing of their motion in no way impacts the adjudication of the rights of the *UNC* parties. Appellants can make absolutely no argument why intervention at the present time causes any prejudice that allegedly would not have occurred if non-intervention related litigation was ongoing. In fact,

² The Appellants' assertion that Intervenors knew about the *United Nuclear* litigation for over a year is both factually unsupported by the record and irrelevant. Appellants cannot explain why they have suffered greater prejudice, if any, in 1989 than they would have suffered in 1988. Moreover, Appellants' assertion of the status of discovery in the Intervenors' lawsuits is wholly unsupported by any reference to the record and should be disregarded by this Court. See *Hicks v. Mickelson*, 835 F.2d 721, 724 (8th Cir. 1987) (statements in appellate brief are not substitute for record and should be disregarded by appellate courts).

their position on timeliness completely contradicts their argument that the intervention “ ‘is not an ingredient of the cause of action and does not require consideration with it.’ ” Brief in Chief at 7, quoting, *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541, 546–47 (1949).

The court in *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989), recognized the distinction between general intervention and limited, discovery-related intervention and granted intervention after the original action had settled. “Because [the intervenor] sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties” *Id.* at 786. See also *Olympic Refining v. Carter*, 332 F.2d 160 (9th Cir), *cert. denied*, 379 U.S. 900 (1964) (intervention allowed nearly three years after settlement); *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988) (intervention allowed four years after settlement; under local rules based on federal rules); *Meyer Goldberg, Inc. v. Fisher Foods*, 823 F.2d 159 (6th Cir. 1987) (intervention allowed six months after settlement); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (intervention allowed after settlement).

Even if timeliness was an appropriate question in discovery-related intervention, Appellants have not provided sufficient reason for this Court to reverse the trial court’s holding on timeliness as abusive of discretion or clearly erroneous. In *Sanguine*, this Court set out four factors to analyze in determining timeliness:

[1] length of time since the applicant knew of his interest in the case, [2] prejudice to the existing parties, [3] prejudice to the applicant, and [4] the existence of any unusual circumstances.

736 F.2d at 1418.³ Appellants are unable to argue that an analysis of any of these factors represents an abuse of discretion. As explained above, Appellants present no analysis regarding the first factor.

With regard to the second factor to determine timeliness, Appellants assert that they will suffer prejudice for three reasons: that they originally produced documents under a protective order, that they are being denied the opportunity to review the documents and that they are burdened by the expense of reviewing documents. An analysis of these reasons indicates that they are unpersuasive and that they are unrelated to any alleged prejudice caused by the timing of the intervention.

Appellants argue that they relied on the protective order in producing documents to UNC, but disregard the fact that the Intervenor expressly agreed to be covered by the same protective order, *i.e.*, the UNC documents will only be used for the purpose of litigating similar cases against the same defendants. Doc. 142 at 2. The trial court, in rejecting Appellants' argument on this point, expressly found that "[Intervenors] have agreed to be bound by the terms of the protective order and seek only limited, relevant information from the file, which defendants would be obligated to duplicate and produce in the pending lawsuits. Defendants will not lose the benefits of the settlement for which they bargained." Doc. 158 at 5.

The Appellants further argue that they are prejudiced by both (1) not being allowed to review the documents before production to Intervenor and (2) by bearing the expense of the review. Brief in Chief at 21. Not only are these arguments factually inconsistent, they misrepresent the status of

³ The *Sanguine* analysis is the incorrect standard because it involved intervention of right and not permissive intervention as relied upon by the Intervenor and the trial court. Accordingly, Appellant's arguments in reliance on *Sanguine* should be disregarded. Intervenor responds to these misplaced arguments only in case this Court finds the *Sanguine* analysis helpful.

the litigation. First, Appellants have had ample opportunity to review the documents produced to the Intervenor. In fact, the Intervenor has been forced to move to compel production of the documents from the Appellants. Doc. 168.⁴ The Appellants also ignore the essential value of discovery sharing. Obtaining discovery from this litigation would substantially lessen their expense in producing this discovery in the pending matters.

Appellants' citation to authority on this position is likewise unpersuasive. The court in *Forest Oil Corp., v. Tenneco, Inc.*, 109 F.R.D. 321, 322 n.2 (S.D. Miss. 1985), specifically recognized that "[t]he clear majority of courts utilizing the test for modification of protective orders set out in *Wilk* have allowed liberal modification." Moreover, the quoted provision from *Wilk* indicated that "the district court has broad discretion in judging whether . . . injury outweighs the benefits of any possible modification of the protective order." *Id.* at 322 (quoting *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1980)). While the *Forest Oil* opinion may indicate why one district court weighed the costs and benefits of modification differently than the lower court here, such weighing is necessarily based on the facts and circumstances before each court in each particular case. The *Forest Oil* case reaffirms the case-by-case nature of this question and gives this Court no basis in law to find that the lower court abused its discretion in making its decision on the facts and circumstances of *this* case. Finally, Appellants' citation to *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335 (3rd Cir. 1987) is frivolous. The *Cippollone* defendants argued that they were prejudiced by the modification of a protective order; however, the court specifically rejected that argument and approved the discovery sharing. *Id.* at 344-45.

⁴ The pending motion to compel is before the trial court based on its denial of a motion to quash the deposition subpoena (Doc. 163) and this Court's subsequent denial of Appellants' Emergency Application for a Stay, based on a finding of no likelihood of success on appeal. Order of September 14, 1989.

The third factor to determine timeliness is whether the Intervenor will suffer prejudice if the intervention is denied. Appellants assert that Intervenor would have suffered no prejudice if the intervention had been denied. Their argument, however, wholly disregards the fact that this Court's review is limited only to whether the trial court abused its discretion in specifically holding that "[Intervenor] have a legitimate interest in seeking modification of the protective order." Doc. 158 at 4–5. Appellants' misunderstanding of appellate review is especially egregious in light of the fact that the trial court must have accepted Intervenor's argument that "[d]enial of the motion to intervene will substantially prejudice [Intervenor]." Doc. 156 at 5.

Appellants' arguments concerning the fourth factor from *Sanguine*, the existence of unusual circumstances, is likewise inappropriate. Appellants argue that the only unusual circumstance is that Intervenor have no interest in the outcome of the UNC litigation. Brief in Chief at 23. Appellants, however, fail to indicate what this point has to do with timeliness or why this Court should upset the trial court holding that the Intervenor "have a legitimate interest in the modification of the protective order." Doc 158 at 4–5.

Appellants make the additional argument that the trial court applied the wrong standard and looked only to the prejudice to the litigation. Brief in Chief at 19–20. First, Appellants fail to cite any authority for their general reference to "those cases in which intervention was sought for an ancillary purpose," *id.* at 20, and their apparent reliance on impact on the parties. More importantly, the district court properly and expressly considered prejudice to the parties. "I must consider whether the opposing party will suffer undue prejudice or delay." Doc. 158 at 4. In fact, in the very next sentence after the sentence quoted by Appellants, the Court stated, "[Appellants] have not shown that they will suffer greater prejudice, if any, now than they would have suffered at any time in the past." *Id.*

Appellants have failed to meet their high burden in persuading this Court that the trial court's holding on timeliness is an abuse of discretion. Not only is timeliness irrelevant to the present type of intervention, but an analysis of timeliness indicates that the court did not abuse its discretion.

2. Interest Relating To The Property is An Inappropriate Factor In Discovery-related Intervention.

Appellants argue that Intervenors should have an interest relating to the property or transaction which was the subject of the principal suit, again citing *Sanguine*. Brief in Chief at 18. This consideration misstates the relevant legal principal and, more importantly, demonstrates why the *Sanguine* opinion is irrelevant to the present analysis. First, as the Appellants readily concede, *Sanguine* concerned intervention of right. Brief in Chief at 17-18. Intervenors here sought to become part of this case through permissive intervention. Doc. 142.

Second, the relevant question is not whether the Intervenors have an interest in UNC's insurance policies but whether this intervention and subsequent discovery sharing would substantially assist the judiciary by decreasing discovery disputes. The trial court ruled that this standard has been met, Doc. 158 at 4, and the Appellants give no reason other than their strident, but generalized dissatisfaction, for this Court to find that ruling to have been clearly erroneous or an abuse of discretion.

The Appellants assert that each of the relevant insurance policies is site-specific. Brief in Chief at 22. They do so, however, with absolutely no reference to the record as required by Federal Rule of Appellate Procedure 10(b) (2). In fact, no such evidence exists in the record. The Appellants are also completely unable to explain how this Court can overrule the trial court's evidentiary finding "that the interpretation of EIL policies issued by or through [Appellants], which

was the subject of the UNC case, is common to [Intervenors'] pending litigation." Doc. 158 at 4.

The Appellants finally argue that discovery sharing only occurs in products liability or mass tort cases and that it should only be used in litigation where the defendant has substantially more resources than the plaintiff. Brief in Chief at 23-24. These arguments are incorrect. First, Appellants' assertions about the types of cases in which discovery sharing have occurred are wholly unsupported by citation to legal authority. Second, much of the discovery sharing approved by federal appellate courts has arisen in commercial litigation. See, e.g., *Meyer Goldberg, Inc. v. Fisher Foods*, 823 F.2d 159 (6th Cir. 1987) (antitrust litigation); *In the Matter of Film Recovery Systems, Inc.*, 804 F.2d 386 (7th Cir. 1986) (hazardous waste clean-up). Moreover, Appellants are unable to provide a single reason why discovery sharing is inappropriate in the commercial context. Finally, the relative wealth of the litigants is irrelevant to this analysis. The appropriate analysis demonstrates that the true cost advantage is to the judiciary.

POINT III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT INTERVENORS HAD STANDING TO SEEK A MODIFICATION OF THE PROTECTIVE ORDER.

A. Applicable Standard of Review.

As Appellants concede, the standard for appellate review of an order granting intervention is whether the trial court abused its discretion. *Sanguine, Ltd. v. United States Department of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984); See Brief in Chief at 11.

B. After the Trial Court Granted the Motion to Intervene, Intervenors Had Standing to Seek the Modification of the Protective Order.

Appellants again ignore the substantial body of relevant opinions in which a similarly situated litigant intervenes into a pending or settled matter, and thus attains party status, and obtains discovery through a modification of a protective order. By relying instead on an opinion in which intervention was not sought, Appellants mistakenly argue that Intervenors do not have standing to modify the protective order.

The Appellants have completely misidentified the relevant issue when they characterize it as “whether a non-party should be granted access to discovery documents in a concluded litigation covered by a protective order.” Brief in Chief at 12. Intervenors are not non-parties. Appellant’s misunderstanding stems from their misplaced reliance on *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir.) *cert. denied*, 473 U.S. 905 (1985) which they concede does not involve intervention. Brief in Chief at 12.

In *Oklahoma Publishing*, appellant was not a party to the litigation and did not move to intervene; instead, it based its claim for standing on its first amendment right to gather information. *Oklahoma Publishing*, 748 F.2d at 1423. The Supreme Court, however, has consistently recognized that the first amendment does not grant unlimited right for news organizations to gather information. *Id.* at 1425 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)). Moreover, the *Oklahoma Publishing* court recognized that even if the trial court had modified the protective order, that would not have guaranteed that Oklahoma Publishing would have had access to the documents because it had no reason to believe that the parties would disseminate the documents. *Id.* at 1425.

The present case differs in several significant ways from *Oklahoma Publishing*. First, unlike the Oklahoma Publishing Company, Intervenors are parties to this litigation. Once the

trial court granted the motion to intervene, Intervenor[s] became "full participant[s] in the lawsuit and [were] treated just as if [they] were . . . original part[ies]." *Schneider v. Dumbarton Developer, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *State of Idaho v. Freeman*, 507 F. Supp. 706, 712 (D. Idaho 1981). Accordingly, once they had intervened, the Intervenor[s] had full standing to move to modify the protective Order. *Cf. Freeman*, 507 F. Supp at 712.

Second, Intervenor[s] have never intended to disseminate the documents. From the beginning of their involvement with this matter, they have promised to comply with the modified protective order and to use the information only in their pending cases. Doc. 142 at 2.⁵ This matter, therefore, is wholly different from *Oklahoma Publishing*. The more persuasive and analogous precedents are cases in which a party was allowed to intervene because of its need for discovery. *See, e.g., Meyer Goldberg, Inc. v. Fischer Foods*, 823 F.2d 159 (6th Cir. 1987).

Finally, the present case substantially differs from *Oklahoma Publishing* in that modification of the protective order has allowed Intervenor[s] access to discovery. After the Court granted intervention and modified the protective order, the Intervenor[s] served a subpoena duces tecum upon Richard Mackenzie, counsel for UNC and custodian of the documents. Doc. 159. The Appellants concede that Mackenzie had access to the documents and made some available. Brief in Chief at 15. The Appellants withheld other documents, which are the subject of a pending motion to compel. Doc. 168. Accordingly, the holding in *Oklahoma Publishing* that modifying the protective order would not necessarily redress

⁵ Despite the clear ruling that Intervenor[s] would be given access to the UNC documents for use in their own litigation, Appellants have taken the insupportable position that the Intervenor[s] may not share the documents to the courts or parties in those cases. In a wholly improper attempt to supplement the record, Appellants have gratuitously attached a transcript from a conference in the case brought by Intervenor Rohm and Haas. Intervenor[s] motion to strike this transcript, *inter alia*, is filed herewith.

Oklahoma Publishing's injury is not applicable here. Appellants' reference to ownership of the documents and an alleged state court filing are not only irrelevant, their failure and, in fact, inability to cite to any record evidence for these factual allegations prohibits this Court's reliance on such assertions on appeal.

POINT IV. THE TRIAL COURT PROPERLY EXERCISED DISCRETION IN ALLOWING INTERVENTION AND MODIFICATION OF THE PROTECTIVE ORDER NOTWITHSTANDING THE PROTECTIVE ORDER OR THE SETTLEMENT AGREEMENT.

A. Applicable Standard of Review.

The trial court has broad discretion concerning protective orders and this Court will disturb a trial court ruling on a protective order only if there has been an abuse of discretion. *In Re Standard Metals Corp.*, 817 F.2d 625, 628 (10th Cir. 1987). An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling. *In Re Coordinated Pretrial Proceedings*, 669 F.2d 620, 623 (10th Cir. 1982). A reviewing court should not substitute its judgment for that of a trial court. *Id.*

B. The Existence of a Protective Order Does Not Provide a Reason Why the Court Could Not Modify the Protective Order.

Appellants argue that the trial court erred in modifying the protective order because a protective order was in place. *See* Brief in Chief at 25. This argument is clearly illogical because the existence of a protective order is a condition precedent to a modification of a protective order. A court, has the inherent power to modify its own order for good

cause — a showing which the trial court herein found Intervenor had satisfactorily made after weighing the appropriate factors.

The opinions cited by the Appellants do not further their argument. The Appellants incorrectly rely on *Martindell v. ITT Corp.*, 594 F.2d 291 (2d Cir. 1979) and *Minpeco v. Con-ticommodity Services, Inc.*, 832 F.2d 739 (2d Cir. 1987). *Martindell* and *Minpeco* involved the government intervening into private litigation to obtain the fruits of discovery. 594 F.2d at 292; 832 F.2d at 740. Courts have consistently distinguished these opinions from cases concerning the intervention by private litigants because the government already enjoys an overwhelming investigatory advantage. See, e.g., *Wilk v. American Medical Association*, 635 F.2d 1295, 1300 (7th Cir. 1980) ("When the investigator is the government, there is also a unique danger of oppression") (footnotes omitted). In fact, the First Circuit recently rejected the "compelling need or overwhelming circumstances" test applied in the cases upon which Appellants rely on precisely this basis. In *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988), cert. denied, 109 S. Ct. 838 (1989), the court specifically stated "[o]utside the area of government intervention, courts have applied much more lenient standards for modification."

FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982) is likewise unpersuasive because the intervenors had argued that a court's ability to withhold federal agency documents from the public was restricted only to those reasons listed in the Freedom of Information Act. *Id.* at 232. The court rejected that argument and held that the FOIA does not apply to courts or confidentiality orders entered by courts. *Id.* The *FDIC* intervenors never argued that they should have access to discovery to expedite pending litigation and never agreed to be covered by a modified protective order, as the present Intervenor has done. Because of the significant differences

between these factual situations, *FDIC* does not apply to the present case.

C. The Existence of a Settlement Agreement Does Not Indicate That the Court Abused Its Discretion in Granting Intervention and Modification of the Protective Order.

The existence of a settlement agreement or a protective order provision in the settlement agreement does not give this Court cause to overrule the broad discretion of the trial court. First, Appellants' assertion of the materiality of the confidentiality provision is unsupported by the record. Second, notwithstanding the existence of the settlement agreement, the court ruled that the Appellants would have to produce the documents anyway. Third, the legal authority cited by Appellants does not support their conclusion.

First, Appellants are unable to cite to a reference in the record that confidentiality was a material term in their settlement agreement. Moreover, they fail to state that the same judge both approved the settlement agreement and granted the modification of the protective order. The trial court was aware of the terms of the settlement agreement and found that the intervention would not affect it. Doc. 158 at 5.

Second, Appellants' argument that they will be prejudiced because sealing the court file was part of their settlement disregards the trial court's specific holding that "[Appellants] would be obligated to duplicate and produce [relevant information from the file] in the pending lawsuits." Doc. 158 at 5. If Appellants must produce the same documents to Intervenor eventually, their settlement agreement provides them no protection and the present intervention is a more efficient mechanism for the documents to be produced.

Third, the opinions cited by Appellants do not hold that a trial court cannot modify a protective order to allow an intervenor access to protected discovery simply because a settlement

agreement refers to the protective order. In both *In Re Franklin National Bank Securities Litigation*, 92 F.R.D. 468 (E.D.N.Y. 1981), *aff'd sub nom. FDIC v. Ernst & Ernst*, 677 F.2d 23 (2d Cir. 1982) and *Palmieri v. State of New York*, 779 F.2d 861 (2d Cir. 1985), the intervenors sought the exact terms of the settlement agreement. The courts relied on the special confidentiality of settlement agreements to deny the relief sought. 92 F.R.D. at 472; 779 F.2d at 865. Intervenors here did not request the terms of the settlement agreement, only discovery documents produced pursuant to protective orders that were later referred to in a settlement agreement. The court in *In Re Agent Orange Product Liability Litigation*, 99 F.R.D. 645, 650 (E.D.N.Y. 1983), *aff'd*, 821 F.2d 139 (2d Cir. 1987), distinguished *FDIC* on this same basis. The Second Circuit specifically held that the trial court had not abused its discretion in unsealing the discovery materials despite the existence of a settlement agreement. 821 F.2d at 145. This Court should do the same here.

III. CONCLUSION

For all of these reasons this Court should dismiss this appeal for lack of jurisdiction, or in the alternative, should affirm the trial court in all respects.

INTERVENORS-APPELLEES' STATEMENT REGARDING ORAL ARGUMENT

Intervenors-Appellees concur in Appellant's request for oral argument.

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CERTIFICATE OF SERVICE

I, Philip B. Davis, attorney for intervenors-appellees, hereby certify that on December 19, 1989, I mailed a copy of Intervenor Appellees' Response Brief to all Counsel of Record.

Dated: December 19, 1989

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